Supreme Court, U.S.
FILED
96 343 AUG 30 1996
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

VILLAGE OF SCHAUMBURG,
a Municipal Corporation,

Petitioner,

v.

AMOCO OIL COMPANY,
a Maryland Corporation,

Respondent.

On Petition for Writ of Certiorari to the Illinois Appellate Court, First District

PETITION FOR WRIT OF CERTIORARI

JACK M. SIEGEL
Counsel of Record
ALTHEIMER & GRAY
10 South Wacker Drive
Suite 4000
Chicago, Illinois 60606
(312) 715-4677
Attorney for Petitioner, Village of Schaumburg

Midwest Law Printing Co., Chicago 60610, (312) 321-0220

152 PP

QUESTIONS PRESENTED FOR REVIEW

1. Was there a "taking" under the Fifth and Fourteenth Amendments by the enactment of a special use zoning ordinance requiring the dedication of a portion of the property for adjacent roads when the ordinance never became effective and the Village never asserted any dominion over the property?

2. Was there a "taking" when there was no destruction of property value because of a limited dedication condition affecting a small portion of the entire tract?

3. Whether there is a conflict in state decisions regarding the *Dolan* opinion which requires clarification by this Court?

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The caption of the case in this court contains the names of all parties to the proceedings in the Illinois Appellate Court for the First District.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW	i
LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW	ii
TABLE OF AUTHORITIES	iv
CITATION OF OPINIONS AND ORDERS ENTERED BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS RELIED ON FOR ALLOWANCE OF THE WRIT	6
I.	
NO TAKING OCCURRED BY VIRTUE OF THE SPECIAL USE ORDINANCE WHICH CONTAINED THE DEDICATION CONDITION BUT WAS SUBSEQUENTLY REPEALED	8
II.	
THERE WAS NO DESTRUCTION OF PROPERTY VALUES BECAUSE OF THE LIMITED DEDICATION CONDITION AFFECTING A SMALL PORTION OF THE TRACT	12
III.	
THERE IS A CONFLICT IN STATE DECISIONS REGARDING THE *DOLAN* HOLDING WHICH REQUIRES CLARIFICATION BY THIS COURT	17
CONCLUSION	20
APPENDIX	*infra*

TABLE OF AUTHORITIES

Cases:	PAGE(S)
Andrus v. Allard, 444 U.S. 51, 62 L.Ed.2d 210, 100 S.Ct. 318 (1979)	15, 18
Concrete Pipe & Pension Fund, 508 U.S. ____, 124 L.Ed.2d 539, 113 S.Ct. ____ (1993)	15, 16
Dolan v. City of Tigard, 512 U.S. ____, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994)	*passim*
Estate & Heirs of Sanchez v. Bernalillo County, 902 F.2d 550 (N.M. 1995)	18
First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 96 L.Ed. 2d 250, 107 S.Ct. 2378 (1987)	7, 9
Goffinet v. County of Christian, 65 Ill.2d 40 (1976)	8, 11, 12
Horn v. City of Chicago, 403 Ill. 549 (1949)	9
Keystone Coal Association v. DeBenedictis, 480 U.S. 470, 94 L.Ed.2d 472, 107 S.Ct. 1232 (1987)	13, 16
LaSalle National Bank v. City of Chicago, 128 Ill. App.3d 656 (1984)	9
Lorretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 73 L.Ed.2d 868, 102 S.Ct. 3164 (1982)	6, 7
Lucas v. South Carolina Coastal Council, 505 U.S. ____, 120 L.Ed.2d 798, 112 S.Ct. 1886 (1992)	7, 15
Michigan-Wisconsin P.L. Co. v. Calvert, 347 U.S. 157, 98 L.Ed. 583, 74 S.Ct. 396 (1953)	1
M & J Coal Company v. The United States, 47 F.3d 1148 (Fed. Cir. 1995)	19

Nollan v. California Coastal Commission, 483 U.S. 825, 97 L.Ed.2d 677, 107 S.Ct. 3141 (1987) . . . . . *passim*

Parking Lot Association of Georgia v. City of Atlanta, 450 S.E.2d ____, 132 L.Ed.2d 273, 115 S.Ct. 2268 (1995) 17

Patzner v. Baise, 133 Ill.2d 540 (1990) 9

Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 57 L.Ed.2d 631, 98 S.Ct. 2646 (1978) 13, 14, 17, 18

Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922) . 19

Quirk v. Town of New Boston, 663 A.2d 1328 (N.H. 1995) 17

St. Lucas Association v. City of Chicago, 212 Ill. App.3d 817 (1991) 9

United States v. Alaska, 503 U.S. ____, 118 L.Ed. 2d 222, 112 S.Ct. ____ (1992) 13

VanDyne v. City of Crest Hill, 136 Ill.App.3d 920 (1985) 9

Yee v. Escondido, 503 U.S. ____, 118 L.Ed.2d 153, 112 S.Ct. ____ (1992) 13

Constitutional Provisions:

Fifth and Fourteenth Amendments 2

Illinois Statute:

65 ILCS 5/11-13-1.1 . . . . . 2, 9

Schaumburg Ordinances:

Article VII—Special Uses; Article XII—Business Districts; Ordinance Nos. 91-78, 91-153 3

Article:

Treanor, William Michael "The Original Understanding of the Takings Clause and the Political Process," 95 Columbia Law Review, 782 (1995) . 19

CITATION OF OPINIONS AND ORDERS ENTERED BELOW

The opinion of the Illinois Appellate Court whose judgment is herein sought to be reviewed is case No. 1-94-3648. It appears in the Appendix at page 1. It has not yet been printed in the Official Reporter. The order denying the petition for rehearing appears at page 81 in the Appendix. The order of the Illinois Supreme Court denying leave to appeal appears in the Appendix at page 82. The opinion of the trial court which was affirmed in part and reversed in part by the Appellate Court in Case No. 92 CH 11223 was not published and appears at page 33 in the Appendix. A memorandum opinion and order entered September 9, 1992 in the District Court for the Northern District of Illinois, Eastern Division, appears in the Appendix at page 47.

STATEMENT OF JURISDICTION

The judgment of the Illinois Appellate Court sought to be reviewed was entered on December 15, 1995. It found a "taking" in violation of the Fifth and Fourteenth Amendments. The petition for leave to appeal to the Illinois Supreme Court was denied on June 5, 1996. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257, which provides that final judgments rendered by the highest court of the state may be reviewed by this Court by writ of certiorari where a right under the Constitution is specifically set up or claimed. The discretionary review by the Illinois Supreme Court having been denied, the decision of the Illinois Appellate Court stands as a decision of the highest court of the state. *Michigan-Wisconsin P.L. Co. v. Calvert*, 347 U.S. 157, 98 L.Ed. 583, 74 S.Ct. 396 (1953).

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

This case involves the Fifth and Fourteenth Amendments of the Constitution of the United States. It also involves the provisions of 65 ILCS 5/11-13-1.1 relating to the granting of special uses as part of zoning authority of Illinois municipalities and the provisions of the ordinances of the Village of Schaumburg relating to special uses. Also involved are the ordinances of the Village of Schaumburg granting a special use to the respondent and the subsequent ordinance repealing the special use. The provisions of the Constitution, the statute and the ordinances are found in the Appendix.

STATEMENT OF THE CASE

The respondent Amoco Oil Company is the owner of property located at the northeast corner of Golf Road and Roselle Road in the Village of Schaumburg, the petitioner herein. The property consists of approximately .45 acres which for many years and until after the filing of the original complaint in this action was utilized as a full service gasoline station. Golf Road is a major state arterial highway running in an east-west direction. Roselle is a four-lane north-south County arterial highway.

Since 1984, the Comprehensive Plan of the Village of Schaumburg has contemplated road improvements at this intersection. In 1988, an agreement was entered into with the Illinois Department of Transportation, the County of Cook, the Village of Schaumburg and the neighboring Village of Hoffman Estates providing for a design and engineering study for the purpose of improving the Roselle Road Corridor, commonly known as the

"Triangle Project". The Village of Schaumburg contributed $249,975.00 toward the cost of the study. Phase I of the study was completed and indicated the reconstruction of the intersection of Roselle and Golf Road providing for three lanes in each direction, double left turn lanes on all four approaches and separate right turn lanes on all four approaches.

Amoco sought to remodel its facility into a self-service gas station and food market on the subject site. It applied for a special use and variation which was required under the terms of the Schaumburg Zoning Ordinance. Staff recommended the granting of the special use conditioned, among other things, upon the dedication of 28 feet of right of way along Golf Road and 10 feet right of way along Roselle Road and a 40 foot triangular section of right of way, immediately contiguous to the intersection. The dedication requested conformed to the Triangle Plan which required that property for the proposed improvements of the intersection. The County permit for Roselle Road access also required such a dedication. The plan submitted for remodeling and redevelopment of the site specifically left open the areas required for such improvements. On July 9, 1991, the Village Board adopted Ordinance No. 91-78 granting the special use and variation and included in the ordinance the condition of the dedication as suggested by the Staff. (App. 114)

Amoco refused to comply with the condition requiring dedication. Instead it filed a lawsuit challenging the Village's action in the United States District Court and sought a preliminary injunction. The complaint was based upon an alleged "taking" by the Village as a result of the dedication condition. The preliminary injunction was denied. On November 12, 1991, after a hearing, the

Village adopted an ordinance repealing the original ordinance granting the special use. (App. 122) On September 9, 1992, the Federal District Court granted the Village's motion to dismiss. (App. 47) At all times Amoco was free to continue its operation of a full service station and did so.

On November 20, 1992, Amoco filed a two-count complaint in the Circuit Court of Cook County. Count I of the complaint alleged an unconstitutional taking of a portion of the plaintiff's property by reason of the imposition of the dedication requirement and the subsequent repeal of that ordinance when the plaintiff failed to meet the dedication condition. Count II of the complaint alleged an unconstitutional zoning decision in the refusal of the Village to grant the special use permit without the dedication condition. At no time did the Village interfere with the continuing operation of the existing gasoline filling station nor did it ever go upon the property which had been designated for dedication in the repealed ordinance. The issue of the application of the Fifth and Fourteenth Amendments was raised in Amoco's complaint and was before the trial court as the basis for Count I of the complaint.

After a bench trial, the court granted judgment in favor of the defendant Village and against the plaintiff on Count I and entered judgment in favor of the plaintiff and against the defendant Village on Count II. The order incorporated the oral opinion of the trial court. (App. 33) The court pointed out that Amoco had made no showing that a taking occurred; rather the Village enacted an ordinance whereby Amoco was given a permit which was conditioned on the dedication. That ordinance was subsequently repealed pursuant to the municipality's exer-

cise of its police power. The Village had not physically invaded Amoco's property nor had it denied Amoco's economically viable use of the premises. The court held that the repeal of the initial ordinance eliminated any threat or claim of the taking. The court, however, went on to say that the Village's repeal of the special use permit was an abuse of its zoning power and held that the Village's conduct never amounted to an unconstitutional taking but Amoco had proved that the repeal of the ordinance granting Amoco's special use permit was arbitrary, capricious and unreasonable. The trial court thus denied the taking claim but on pure zoning grounds held that the plaintiff was entitled to build its proposed self-service station and minimart. (App. 43) Amoco appealed the dismissal of Count I, the taking count, whereupon the Village cross-appealed the judgment in favor of Amoco on Count II.

The Appellate Court in its opinion of November 29, 1995, affirmed the relief granted under Count II to the plaintiff but reversed the holding of the trial court with respect to Count I. (App. 1) It held that under the Fifth Amendment, private property shall not be taken for public use without compensation and that restriction had been made applicable to the states through the Fourteenth Amendment. (App. 27) Based upon this Court's ruling in *Dolan v. City of Tigard* 512 U.S. ___, 114 S.Ct. 2309, 2137, 129 L.Ed.2d 304 (1994), and *Nollan v. California Coastal Commission*, 483 U.S. 825, 837, 107 S.Ct. 3141, 3148, 97 L.Ed.2d 677 (1987). Schaumburg's "attempted exaction of the dedication constituted a taking under both the Fifth Amendment of the United States Constitution and Article 1, Section 15 of the Illinois Constitution." (App. 27) Count I was remanded for further

proceedings. The federal question thus was timely and properly raised, both in the trial court and in the Appellate Court. The property at all times remained in the possession and control of Amoco. The State of Illinois subsequently filed condemnation proceedings to acquire the right of way in question and acquired the property. (App. 73)

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The writ should be granted in this case because the decision of the Appellate Court has in fact decided an important question of federal law that should be decided by this court. At issue is a legislative act, the granting of a special use permit for an individual parcel which contained a dedication condition of a small portion of the property which was not accepted by the property owner and never became effective. At issue is whether the mere initial adoption of that ordinance constituted a taking even though there was no attempt to utilize the property or to interfere with the continuing operation of the existing business on the subject property. The opinion, which is the first relating to the effect of *Dolan* in the State of Illinois, goes well beyond the holdings of this Court and puts at risk the basic land use decisions routinely made by municipalities. The opinion holds that the Fifth Amendment requires compensation for a taking when the municipality has not invaded the property nor in any manner rendered the continued use of the property economically unfeasible.

The court's most recent decision on the taking issue in *Dolan v. City of Tigard*, which in turn followed *Lorretto*

v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 73 L.Ed.2d 868, 102 S.Ct. 3164 (1982); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 96 L.Ed. 2d 150, 107 S.Ct. 2378 (1907); *Nollan v. California Coastal Commission*, 483 U.S. 825, 97 L.Ed.2d 677, 107 S.Ct. 3141 (1987) and *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 120 L.Ed. 2d 798, 112 S.Ct. 2886, has failed to give adequate guidance to municipal officials seeking to exercise land use police powers. The question is how far the police power may be extended without invading the realm of "taking" as proscribed by the Fifth and Fourteenth Amendments. By 1995, specific legislation had been adopted in Florida, Texas and Virginia in an attempt to define the limits of "taking" pursuant to this Court's decision in *Dolan*. Such legislation cannot affect federal constitutional rights recognized by this Court. This Court's further consideration of the issues is required. The opinion of the Appellate Court which now becomes ruling case law in Illinois goes well beyond the purpose and intent of *Dolan*. But until this Court gives further direction in this area, state legislatures, the Congress and local officials will be without effective guidelines to determine the constitutional authority to enact land use regulations without compensation.

The opinion sought to be reviewed here reads *Dolan* as requiring compensation or damages when there was no physical taking of property which constitutes a small portion of a larger tract, and the legislative act was repealed before there was any invasion of the property in question or any attempt to interfere with an ongoing business operation. Clearly this Court's opinions cannot support such an unwarranted and illogical application of

the Fifth Amendment. The plans submitted for remodeling the gas station did not contemplate the use of the property which was the subject matter of the original dedication condition. Ironically, the state has now condemned the property supposedly taken by the Village. We seek review only of the holding that a "taking" occurred and the Appellate Court's ruling on Count II is merely a garden variety zoning matter which does not warrant this Court's attention. But the resolution of the "taking" issue calls for this Court's action.

I.

NO TAKING OCCURRED BY VIRTUE OF THE SPECIAL USE ORDINANCE WHICH CONTAINED THE DEDICATION CONDITION BUT WAS SUBSEQUENTLY REPEALED.

The trial court in this case properly rejected the taking claim. The Village in its legislative capacity granted a special use for Type C self-service gas station and minimart subject to a number of conditions, one of which was a dedication for a right of way contemplated in a succession of Village comprehensive plans going back to 1984 and required by a plan undertaken cooperatively by the state, county and the municipalities. The county which had jurisdiction over Roselle Road required such dedication as a condition for an access permit which was essential for the redevelopment of the subject site.

The Illinois law is clear that if the property owner determined that it would not accept the dedication condition, the special use was thereby terminated. When a restriction imposed by a special use permit is not complied with, the special use falls. *Goffinet v. County of Christian,* 65 Ill.2d 40, 53 (1976). Special uses are legislative

acts authorized under the Illinois Zoning Enabling Act, 65 ILCS 5/11-13-1.1. They may be subject to conditions reasonably necessary to meet the standards set forth in the local ordinances. (App. 85) The basic rule in Illinois is that a taking occurs when there is a physical taking or invasion of the property. *Patzner v. Baise,* 133 Ill.2d 540 (1990); *Horn v. City of Chicago,* 403 Ill. 549 (1949); *LaSalle National Bank v. City of Chicago,* 128 Ill.App.3d 656 (1984).

In the case of *St. Lucas Association v. City of Chicago,* 212 Ill.App.3d 817 (1991), the court held that an unconstitutional zoning restriction did not result in a taking. The plaintiff in that case unsuccessfully relied upon this court's decision in *First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 154, 96 L.Ed. 2d 150, 107 S.Ct. 2378 (1987). To the same effect was the decision of *VanDyne v. City of Crest Hill,* 136 Ill.App.3d 920 (1985), where the court held that an invalid zoning ordinance did not constitute a taking.

The Appellate Court's opinion here was based upon this Court's decision in *Nollan v. California Coastal Commission,* 483 U.S. 825, 97 L.Ed.2d 677, 107 S.Ct. 3241 (1987) and *Dolan v. City of Tigard,* 512 U.S. ___, 129 L.Ed.2d 304, 114 S.Ct. 2309 (1994). Neither of these cases is in point. *Nollan* involved a condition imposed on a permit to demolish an existing structure and rebuild. The condition was imposed by the California Coastal Commission that was the issuing agency for such permit. The *Dolan* case involved a condition on a building permit which required the dedication of a portion of the lot to the City for green way and a pedestrian/bicycle path. Neither of the cases involved a legislative act, such as the ordinance at issue here or an easement directly related to the remainder of the property.

Nollan recognized the advancement of a legitimate state interest as a proper justification for imposing conditions. In the instant case, it is clear that providing a right of way for needed roadway improvements adjacent to a land use change which intensified the use of the property would substantially advance a legitimate state interest. Acquisition of the necessary right of way by affected municipalities would expedite the necessary highway improvements. Thus, in *Nollan* at 483 U.S. 834, the court said:

> We have long recognized that land-use regulation does not effect a taking if "substantially advance[s] legitimate state interests" and does not "den[y] an owner economically viable use of his land," Agins v. Tiburon, 447 US 255, 260, 65 L Ed 2d 106, 100 S Ct 2138 (1980). See also Penn Central Transportation Co. v. New York City, 438 US 104, 127, 57 L Ed 2d 631, 98 S Ct 2646 (1978) ("[A] use restriction may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial government purpose"). Our cases have not elaborated on the standards for determining what constitutes a "legitimate state interest" or what type of connection between the regulation and the state interest satisfies the requirement that the former "substantially advance" the latter. They have made clear, however, that a broad range of governmental purposes and regulations satisfies these requirements. See Agins v. Tiburon, supra, at 260-262, 65 L Ed 2d 106, 100 S Ct 2138 (scenic zoning); Penn Central Transportation Co. v. new York City, supra (landmark preservation); Euclid v. Ambler Realty Co. 272 US 365, 71 L Ed 303, 47 S Ct 114, 4 Ohio L Abs 816, 54 ALR 1016 (1926) (residential zoning); Laitos & Westfall; Government Interference with Private Interests in Public Resources, 22 Harv Envtl L Rev 1, 66 (1987).

In the instant case, the whole question should have been moot, because there was never a taking. There was never an invasion of the property. The special use and variation ordinance never became effective. The ordinance was rendered void by reason of the failure of the plaintiff to comply with its conditions under the *Goffinet* doctrine. The ordinance which was adopted on July 9, 1991 and repealed on November 12, 1991 never went into effect. The plaintiff never lost control of its land in any manner and continued to use the property in precisely the way it had been using its property for more than 20 years. The plans submitted for remodeling did not include the use of the small portion of the property which had been designated for future highway expansion.

Particularly applicable is Justice Stevens' remarks in his dissenting opinion in *Dolan.* At 129 L.Ed.2d 330, he said:

> Dolan has no right to be compensated for a taking unless the city acquires the property interests that she has refused to surrender. Since no taking has yet occurred, there has not been any infringement of her constitutional right to compensation. See *Preseault v ICC,* 494 US 1, 11-17, 108 L Ed 2d 1, 110 S Ct 914 (1990) (finding takings claim premature because property owner had not yet sought compensation under Tucker Act); *Hodel v Virginia Surface Mining & Reclamation Assn., Inc.*, 452 US 264, 194-295, 69 L Ed 2d 1, 101 S Ct 2352 (1981) (no taking where no one "identified any property . . . that has allegedly been taken").

In *Dolan*, there was no request for a special use or change in zoning which would allow Dolan to utilize property in a manner not otherwise permitted. Here, Amoco was seeking a legislative act to grant it certain

benefits. In *Dolan* this Court applied a two-part test. It first sought to determine whether a nexus existed between legitimate state interests and the permit conditions; then a determination whether there was a rough proportionality between the exactions and the projected impact of the proposed development. In the instant case the nexus clearly existed because the dedication requirements imposed related to the public interest in the highway improvement. The proportionality existed because the dedication was directly related to the land sought to be improved by the special use and improved access to the development.

The condition which was attacked as a "taking" simply never became effective. The repealer ordinance recognized and formalized the fact that when Amoco refused to accept the conditions, the special use was vitiated under the *Goffinet* doctrine. (App. 122) Once the special use was repealed, before any effort to control the property had taken place, the controversy resolved itself into a conventional zoning dispute. We are not seeking a review of the merits of the zoning, but we insist that the stretching of the Fifth Amendment "taking" provision demonstrated by the Appellate Court simply is not warranted by *Dolan* or *Nollan* and misrepresents this Court's view of the constitutional issues involved.

II.

THERE WAS NO DESTRUCTION OF PROPERTY VALUES BECAUSE OF THE LIMITED DEDICATION CONDITION AFFECTING A SMALL PORTION OF THE TRACT.

This Court has not hesitated to limit the taking requirements of the Fifth Amendment even in situations

which represented a major destruction of property value. In the case of *Yee v. Escondido,* 503 U.S. ___, 118 L.Ed. 2d 153, 165, 112 S.Ct. ___ (1992), in rejecting a taking argument based on *Nollan*, the court said:

> The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land. "This element of required acquiescence is at the heart of the concept of occupation." FCC v Florida Power Corp., 480 US 245, 252, 94 L Ed 2d 282, 107 S Ct 1107 (1987).

See also *United States v. Alaska,* 503 U.S. ___, 118 L.Ed.2d 222, 112 S.Ct. ___ (1992) where the Court held that *Nollan* was inapplicable when the Secretary of the Army conditioned the approval of port construction on Alaska's disclaimer of a claim to land in controversy with the federal government. The Court noted that, as here, imposing a condition for the issuance of the permit was the same as denying a permit.

In the case of *Keystone Coal Association v. DeBenedictis,* 480 U.S. 470, 94 L.Ed.2d 472, 107 S.Ct. 1232 (1987), the Court held there was no taking by virtue of the Pennsylvania statute which restricted mining operations. The court in deciding whether a particular governmental action had the effect of a "taking" for purposes of the Fifth Amendment, said it should not divide a single parcel into discreet segments but should rather focus on the character of the action and the nature of the interference of the rights in the parcel as a whole. *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104, 57 L.Ed.2d 631, 98 S.Ct. 2646 (1978).

It should be emphasized that in the instant case the granting of the special use subject to the dedication would have enhanced the value of the subject property

and provided additional safe access to the intensified use. In the *Penn Central* case, this Court noted that it had been unable to develop any set formula for determining when justice and fairness require that economic injuries caused by public action be compensated by the government rather than remain disproportionately concentrated on a few persons. It went on to say at 438 U.S. 124:

> In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. See Goldblatt v. Hempstead, supra, at 594, 8 L Ed 2d 130, 82 S Ct 987.

The original ordinance dedication provisions here would have affected only a small portion of the parcel as a whole, and the ordinance granted to Amoco significant economic benefits rather than have created an adverse economic impact. There was no interference in any manner with the site of the proposed redeveloped improvement. In the *Penn Central* case, the Court went on at page 130 to say:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole—here, the city tax block designated as the "landmark site."

Nothing in *Lucas,* or *Nollan* or *Dolan* obligated the Appellate Court to divide the single parcel into discrete segments and thus determine that the dedication of roadway frontage constituted a taking.

In *Andrus v. Allard,* 444 US 51, 62 L.Ed.2d 210, 100 S.Ct. 318 (1979), the court at page 65 said:

> But the denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking, because the aggregate must be viewed in its entirety. Compare Penn Central, supra, at 130-131, 57 L Ed 2d 631, 98 S Ct 2646, and United States v. Twin City Power Co., 350 US 222, 100 L Ed 240, 76 S Ct 259 (1956), with Pennsylvania Coal Co. v. Mahon, supra, and United States v. Virginia Electric & Power Co., 365 US 624, 5 L Ed 2d 838, 81 S Ct 784 (1961). See also Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv L Rev 1165, 1230-1233 (1967), In this case, it is crucial that appellees retain the rights to possess and transport their property, and to donate or devise the protected birds.

In this case, the special use even with the condition clearly enhanced the value of the property. The site plan submitted by Amoco and approved as part of the special use showed proposed development outside of the area which was the subject matter of the condition. Amoco retained its right to fully develop the property as it proposed. There clearly was no taking.

In the case of *Concrete Pipe v. Pension Fund,* 508 U.S. ___, 124 L.Ed.2d 539, 113 S.Ct. ___ (1993), the court relying on *Penn Central,* again made the point that a claim-

ant's parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable. The court noted that the relevant question is whether the property taken is all or a portion of the parcel in question, citing *Keystone.* In the instant case, the plans for remodeling the subject property contemplated the roadway improvements set forth in the Triangle Plan. The dedication requirement which was imposed in the original special use ordinance and required by the County in no way diminished the value of the parcel in question or interfered with the proposed use.

In *Concrete Pipe,* the Court also indicated that a factor bearing on a "taking" determination was the severity of the economic impact of the plan. There was no economic impact on the proposed redevelopment as a result of the proposed dedication, nor was the other factor, the degree of interference with reasonable investment backed expectations of any consequence.

The Appellate Court misread the dictates of *Dolan.* There simply was no taking under the Fifth and Fourteenth Amendments by the enactment of the special use ordinance which requested dedication for an adjacent road, in light of the fact that the ordinance was not accepted and never became effective and the proposed dedication of a small portion of the tract would not have interfered in any manner with the proposed development.

III.

THERE IS A CONFLICT IN STATE DECISIONS REGARDING THE *DOLAN* HOLDING WHICH REQUIRES CLARIFICATION BY THIS COURT.

The Appellate Court opinion at page 18 recognizes the case of *Parking Lot Association of Georgia v. City of Atlanta* 450 S.E.2d ___ (1995) and the denial of the writ by this Court. 132 L.Ed.2d 273, 115 S.Ct. 2268. That case totally supports the petitioner's position in this matter. In dissenting from the denial, Justice Thomas joined by Justice O'Connor, noted that the lower courts are in conflict over whether *Dolan* applies when the alleged taking occurs through an act of legislation, such as that in the case at bar.

In addition to the *Parking Lot Association of Georgia* and the *Harris* case cited by Justice Thomas, several other state courts have found no taking in comparable situations to that in the case at bar, after *Dolan* was decided. In the case of *Quirk v. Town of New Boston,* 663 A.2d 1328 (N.H. 1995), the Supreme Court of New Hampshire found that the requirement of a 100 foot buffer zone around a campground did not constitute a taking. The court indicated that focusing on a discrete portion of a larger tract may be appropriate only where the landowner has fragmented the property for distinct development or uses. The court at 1333 went on to say:

> Moreover, these considerations do not detract from the general rule that property owners cannot "establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development." *Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 130, 98 S.Ct. 2646, 2650, 57 L.Ed.2d 631 (1978).

> In the present case, we find no compelling reason to view the perimeter as a discrete segment of the campground. That the plaintiff has never treated the perimeter of this campground as distinct from the interior supports this finding. "At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety. *Andrus v. Allard,* 444 U.S. 51, 65-66, 100 S.Ct. 318, 327, 62 L.Ed.2d 210 (1979); see *Penn Central Transp. Co.,* 438 U.S. at 130-31, 98 S.Ct. at 2662.

In the case of *Estate & Heirs of Sanchez v. Bernalillo County,* 902 F.2d 550 (N.M. 1995), the Supreme Court of New Mexico held that the denial of an application for a special use permit to develop a mobile home park did not give rise to an inverse condemnation claim given that the owner did not lose all or substantially all beneficial use of the property. At page 552, the court said:

> Thus the right protected by the Takings Clause is a right to substantial use and enjoyment of property. Because it does not significantly impact the use and enjoyment of the subject property, a regulation not reasonably related to a proper purpose that does not deprive a property owner of all or substantially all beneficial use of property simply does not implicate an interest protected by the Takings Clause. Although a property owner may have a right to seek redress for an unlawful regulation, the method of redress is not a takings action.

It is thus clear that this court's continued guidance on the question of "taking" is badly required. In a recent discussion of this subject, a prominent legal scholar commented about the court's efforts to determine what kind of regulations run afoul of Justice Holmes's vague stan-

dard in *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922). He said:

> Attempts to do so including the court's recent decisions in *Lucas v. South Carolina Coastal Council* and *Dolan v. City of Tigard* have created a body of law that more than one more recent commentator has described as a " 'mess' ". Treanor, William Michael "The Original Understanding of the Takings Clause and the Political Process", 95 Columbia Law Review, 782 (1995).

Treanor suggests that these recent decisions go well beyond the original intent of the takings clause which protected property against physical seizures but not against regulations affecting value. While this court may not wish to reconsider *Lucas* or *Dolan*, the obvious confusion surrounding the impact particularly of the *Dolan* case on the state and federal courts requires further clarification. The Illinois Appellate Court's decision which is the subject matter of this petition is a striking instance of the confusion which persists at the state level. That this confusion extends to the federal courts as well is indicated by among other decisions that of the Court of Appeals for the Federal Circuit in *M & J Coal Company v. The United States*, 47 F.3d 1148 (Fed. Cir. 1995). The Court cited *Penn Central* at page 1153 and said:

> "[T]his Court has dismissed 'taking' challenges on the ground that, while the challenged government action caused economic harm, it did not interfere with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes." (listing cases).

In the instant case, there was absolutely no interference with interests bound up with the reasonable ex-

pectations of Amoco with respect to the redevelopment of its property. The obvious confusion which *Dolan* has created needs to be clarified for the benefit of both the state and the federal courts which continue to be faced by this issue. Legislative attempts to deal with the problem either at the state or federal level cannot resolve what is basically a constitutional issue. This Court's guidance is required and the granting of the writ in this matter will give the Court an opportunity to provide that guidance.

CONCLUSION

This Court should grant the writ of certiorari because the opinion of the Appellate Court which now stands as the law in Illinois is clearly contrary to the repeated decisions of this Court that have recognized that no taking exists when only a small portion of a claimant's property has been impressed with a regulation which does not interfere with the use of the parcel as a whole. The misreading of *Dolan* gives rise to mischief which will now affect not only the law in Illinois but will have unfortunate consequences for state and federal courts throughout the country. It suggests that a discretionary legislative act which attempts to regulate land, when repealed, can constitute a "taking" even when the ordinance would have enhanced property values rather than diminished them. The plaintiff here was not denied the full use of its property. Nothing in *Dolan* required the conclusion reached by the Appellate Court. There was no taking in any sense by the Village of Schaumburg in the performance of its legislative function.

The state court of last resort has decided an important federal question in a way that conflicts with the decisions of other state courts of last resort and the basic law of "taking" as enunciated by this Court. The Appellate Court has decided an important question of federal law that should be settled by this Court. It has decided an important federal question that conflicts with the relevant decisions of this Court. The question of when a "taking" occurs in the course of legislative action will continue to plague the state and federal courts until this Court speaks decisively and with authority on this basic issue. In order to resolve this issue which has engendered divided opinions of this Court and has left confusion in its wake, the petition for writ of certiorari should be granted.

Respectfully submitted,

JACK M. SIEGEL
Counsel of Record
ALTHEIMER & GRAY
10 South Wacker Drive
Suite 4000
Chicago, Illinois 60606
(312) 715-4677

Attorney for Petitioner,
Village of Schaumburg

APPENDIX

INDEX TO APPENDIX

	APP. PAGE
Opinion of the Appellate Court dated December 29, 1995	1
Final Judgment Order of the Circuit Court dated September 16, 1994	33
Excerpts of Proceedings before the Circuit Court on September 13, 1994	35
Memorandum Opinion and Order of U.S. District Court in the case of *Amoco Oil Co. v. Village of Schaumburg*, No. 91 C 4973 entered September 9, 1992	47
Judgment in civil case in *Amoco Oil Co. v. Village of Schaumburg*, No. 91 C 4973 dated September 9, 1992	62
Complaint to Condemn in the case of the *Department of Transportation v. Amoco Oil Co.*, No. 96 L 50324	63
Order Fixing Preliminary Just Compensation dated August 13, 1996 in the case of the *Department of Transportation v. Amoco Oil Co.*, No. 96 L 50324	73
Order of the Appellate Court denying petition for rehearing entered February 20, 1996	81
Order of the Illinois Supreme Court denying petition for leave to appeal dated June 5, 1996	82
Fifth and Fourteenth Amendments to the United States Constitution	83
65 ILCS 5/11-13-1.1, Zoning Enabling Act, providing for Special Uses	85

Article XII—Schaumburg Zoning Ordinance—Business Districts 86

Article VII—Schaumburg Zoning Ordinance—Special Uses 107

Ordinance No. 91-78—An Ordinance granting Special Use for Type "C" Automobile Services Station Front Yard Set Back Variation and Site Plan Approval adopted July 9, 1991 114

An Ordinance Repealing Ordinance No. 91-78 adopted November 12, 1991 122

FIFTH DIVISION
December 29, 1995

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

No. 1-94-3648

AMOCO OIL COMPANY, a Maryland corporation,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellant/ Cross-Appellee,	)	
v.	)	
VILLAGE OF SCHAUMBURG, a municipal corporation,	)	
Defendant-Appellee/ Cross-Appellant.	)	The Honorable John N. Hourihane, Judge Presiding.

JUSTICE T. O'BRIEN delivered the opinion of the court:

Plaintiff, Amoco Oil Company (Amoco), filed a two count complaint against defendant, Village of Schaumburg (Schaumburg), in connection with the conditional granting and subsequent revocation of a special use permit. The gravamen of the complaint centered upon Schaumburg's requirement that Amoco dedicate approximately twenty percent (20%) of its property as a means of securing approval of a zoning application. After Amoco filed suit in the Federal District Court for the Northern District of Illinois, Schaumburg revoked the ordinance in an apparent effort to divest the federal court of jurisdic-

tion. (*Amoco Oil Company v. Village of Schaumburg* (N.D. Ill. 1992), No. 91 C 4973, 1992 U.S. Dist. Lexis 13719.) Amoco then filed the present State action in the Circuit Court of Cook County.

In Count I of its complaint, Amoco sought declaratory and injunctive relief as well as damages arising out of an alleged taking of its property without just compensation. In Count II, Amoco requested a declaration that the subsequent repeal of the permit was arbitrary and unreasonable. Following a bench trial, the circuit court ruled against Amoco on count I, finding no taking in the absence of a physical invasion of the property. However, the circuit court ruled in favor of Amoco on count II, finding Schaumburg's attempt to revoke the permit did not qualify as a reasonable exercise of Schaumburg's legislative authority. The circuit court then ordered Schaumburg to issue all necessary permits upon appropriate application. Both sides appealed.

For the reasons which follow, we hold that the imposition of the dedication requirement did in fact constitute a taking under the Federal Constitution pursuant to the rationale of *Nollan v. California Coastal Commission* (1987), 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677, and *Dolan v. City of Tigard* (1994), 512 U.S, 114 S.Ct. 2309, 129 L.Ed.2d 304. We further hold that Schaumburg acted arbitrarily and capriciously in repealing the original ordinance granting the permit. Accordingly, we reverse the circuit court as to count I, affirm as to count II, and remand the matter for further proceedings consistent with this opinion.

BACKGROUND

Amoco is the owner of certain property which was at all relevant times improved with an automobile service station and four separate "gasoline pump islands". The property itself is located in a dense commercial area at the northeast corner of Golf Road and Roselle Road in Schaumburg, Illinois. Golf Road is a major arterial highway under the jurisdiction of the Illinois Department of Transportation (IDOT). Roselle Road, on the other hand, is under the jurisdiction of Cook County and the Cook County Department of Highways.

Due to Schaumburg's growth, Golf and Roselle roads have suffered from severe traffic congestion, experiencing over design capacity particularly during the morning and evening "rush hours." As a result, Schaumburg has, since at least 1984, undertaken to redesign the intersection of Golf and Roselle Roads. To that end, Schaumburg, the Village of Hoffman Estates, Cook County and IDOT entered into an agreement in 1988 whereby IDOT would conduct a "Phase I" study, *i.e.*, a preliminary engineering analysis of possible roadway improvements. The study contemplated widening both roads by adding extra lanes of through traffic as well as dual left turn and right turn lanes at the intersection adjacent to Amoco's property.

Meanwhile, in 1989, representatives from Amoco met with Schaumburg staff members to discuss possible improvements to the existing service station. At that time, the property was zoned B-2 General Retail Business District. The station itself was classified as a "Type A" Automobile Service Station, one which only sells gasoline and services automobiles. Under its proposed zoning application, Amoco sought the following improvements:

"A. Razing the existing building and replacing it with a prototypical food shop structure;

B. reconfiguring the pump islands to improve both onsite [sic] circulation as well as ingress and egress, and installing new, modern fuel dispensers at the station[;]

C. eliminating two of the four driveways on the Subject Property, those being the far west driveway on Golf Road and the far south driveway on Roselle Road;

D. extensively landscaping the site; and

E. providing an overhead canopy to better illuminate the facility and shield customers from the elements." (Amoco's Complaint, par. 10.)

Such improvements, however, required a "Type C" classification, and therefore Amoco needed to obtain a special use permit and site plan approval.

At some point during the pre-application meetings, Schaumburg staff members indicated that Amoco would be required to dedicate approximately 20 feet of its property along both Golf and Roselle Roads as a condition to approval of its application. Schaumburg also insisted upon the dedication of a 40' x 40' triangular section at the southwest corner of the subject property. Although Amoco objected to the dedication requirement at that time, it nevertheless submitted a formal zoning application for a special use permit and site plan approval in late 1990.

Subsequently, the Village Zoning Board of Appeals set a public hearing on Amoco's application for February 20, 1991. In the meantime, the village director of planning and the village director of engineering issued a "Project Review Group Report". The report recommended approv-

ing Amoco's application because, "[g]iven the traffic carrying capacity of Golf Road and Roselle Road, the proposed improvements to the intersection and the fact that the property is surrounded by existing low to moderate intensity commercial uses, Staff believes the conversion to a Type "C" automobile service station will not be detrimental to surrounding land uses." Despite the fact that the report also noted that the proposed redevelopment "is an appropriate use for this site given its current use and the surrounding commercial development", the report suggested elsewhere that the Zoning Board of Appeals "[d]enote the additional land required for right-of-way purposes as a 'dedication' and not a 'taking.' "

At the hearing before the Zoning Board, Amoco again objected to the imposition of the dedication requirement. In particular, Amoco explained that the need for any additional right-of-way would not be caused by its proposed redevelopment of its property, but rather by the current deficiencies in the design and traffic capacity of the existing roadways. Amoco also pointed out that the planned dedication amounted to over twenty percent (20%) of the property's total square footage. As a result, the Zoning Board recommended approving Amoco's zoning application without the dedication requirement.

On June 25, 1991, the Village Board of Trustees held a meeting to consider the Zoning Board's decision. At the meeting, the Board of Trustees, although finding that Amoco satisfied the standards for the special use, rejected the recommendation that Amoco's application for redevelopment be approved without the dedication requirement. Instead, on July 9, 1991, the Board of Trustees enacted Ordinance 91-78, "AN ORDINANCE GRANTING SPECIAL USE FOR A TYPE 'C' AUTOMO-

BILE SERVICE STATION, FRONT YARD SETBACK VARIATION AND SITE PLAN APPROVAL". This ordinance was subject to the following condition:

> "Prior to the issuance of a building permit, the petitioner [Amoco] shall submit for review and approval from the Village of Schaumburg a Final Plat of Subdivision for the property. Upon said Plat, the petitioner shall also provide the dedication of twenty-eight (28) feet of additional right-of-way along Golf Road and ten (10) feet of additional right-of-way along Roselle Road, as well as a forty (40) foot triangular section of right-of-way immediately contiguous to the intersection."

In response, Amoco filed suit in the United States District Court for the Northern District of Illinois. The district court, however, denied a motion for preliminary injunction on the grounds that Amoco had a sufficient remedy at law for money damages. Nevertheless, the court noted, in passing, that "if the public officials know that their actions are not supported by the law and persist anyway, driven by some impression that they can attach these conditions because zoning ordinances constitute some kind of public favor to be dispensed, that is certainly against public policy."

Shortly thereafter, the Board of Trustees proposed adopting Ordinance No. 91-153, "AN ORDINANCE REPEALING ORDINANCE NO. 91-78, GRANTING SPECIAL USE FOR A TYPE 'C' AUTOMOBILE SERVICE STATION, VARIATION AND SITE PLAN APPROVAL." On October 30, 1991, the Zoning Board, as required by law, conducted a public hearing on the proposed "repealer ordinance." The Board of Trustees eventually passed the repealer ordinance.

On September 9, 1992, the district court dismissed the federal action on the grounds that Amoco had an appropriate remedy in State court. One month later, Amoco filed the present action before the Circuit Court of Cook County, seeking among other things declaratory and injunctive relief. Amoco asserted that conditioning a special use permit upon dedication amounted to a taking of property without just compensation in violation of both the Federal and the State Constitutions. Amoco also claimed Schaumburg's adoption of the repealer ordinance was an arbitrary and unreasonable use of municipal power, and thus violated Amoco's constitutional right to due process. The case ultimately proceeded to trial.[1]

At trial, Amoco called as a witness Clifford Rudd, a project engineer responsible for the construction of service stations. Rudd testified that he prepared the site plan drawings which were later submitted to Schaumburg as part of the zoning application process. Rudd explained that, because of conditions already existing on Golf and Roselle roads, Amoco was aware that both roads would have to be widened in the future, and that therefore Amoco proposed setting its improvements further back in its lot. In this way, business at the new station would not be interrupted once IDOT condemned the property. The set back would also prevent IDOT from incurring any additional expense in reimbursing Amoco for having to move the improvements. Finally, Rudd confirmed that Schaumburg officials required Amoco to dedicate a portion of its property even before Amoco submitted its formal application.

---

[1] The parties agreed to bifurcate the trial, reserving the issue of damages.

David B. Miller, an expert traffic engineer at Metro Transportation Group, also testified on Amoco's behalf. Amoco retained Miller and his firm in 1990 to conduct certain comprehensive traffic impact studies in connection with Amoco's proposed redevelopment of the property. Miller estimated that, under a worse case scenario, the intended improvements would increase vehicle movements *on the property* by twenty five percent (25%).[2] This projection was based upon the fact that typically seventy percent (70%) of traffic flow at a gasoline station is "impulse" traffic, *i.e.* traffic already present on the streets. As a result, Amoco's proposed improvements would actually have a negligible impact on the traffic flow on Golf and Roselle roads. Specifically, Miller predicted an increase in traffic volume at the intersection resulting from the proposed improvements of between two-tenths of one percent (.2%) and four-tenths of one percent (.4%). The need for widening the roads, according to Miller, preexisted Amoco' s proposed improvements.

On cross examination, Miller acknowledged that Schaumburg conducted a traffic count in 1993 which indicated a larger increase in street traffic volume than Miller's own studies, and that IDOT was considering a greater dedication of right-of-way. Miller nevertheless affirmed the findings of his own studies.

Kenneth Hemstreet, the Chief of the Project and Environmental Studies Section at IDOT's Bureau of Pro-

---

[2] Elsewhere in his testimony, Miller indicated that the proposed removal of two driveways closest to the intersection and the reconfiguration of the pump islands would facilitate the additional ingress and egress to the station, and therefore would enhance the intersection and provide additional on-site and arterial safety.

gramming, testified regarding the "Golf-Higgins-Roselle Triangle Project." This project entails the reconstruction of a two mile stretch along Golf, Higgins and Roselle roads, respectively. Phase I of the project, *i.e.*, the preliminary engineering analysis, was completed in December of 1993 and, with regard to the intersection of Golf and Roselle roads, consisted of the following planned improvements: (i) replacing the current two lanes with three lanes in each direction; (ii) increasing the current 16 foot median with a 28 foot median; and (iii) adding an additional left turn lane for each road as well as a single right turn lane.[3] Finally, Hemstreet noted that Amoco's proposed improvements had no effect on the need to add lanes to Golf and Roselle roads. Indeed, IDOT recommended widening of Golf and Roselle roads regardless of Amoco proposal.

Amoco also called Allen Kracower, a professional urban planner, landscape architect, and real estate consultant. Kracower confirmed that the area in question was heavily commercial in nature, and that the current zoning of the Amoco property was consistent with the contiguous properties. In Kracower's opinion, Amoco's proposed redevelopment was compatible with the surrounding land uses. In fact, after extensively surveying the entire Village of Schaumburg to determine the total number of gasoline service stations and automobile service facilities,

---

[3] Hemstreet further stated that IDOT was awaiting an appropriation of State funds for land acquisition and roadway construction. Walter Kos, a civil engineer employed by IDOT who is responsible for project funding, similarly testified that the corner of Golf and Roselle roads was in IDOT's five-year improvement program and the State funding was still pending at the time of trial.

Kracower concluded that the Amoco proposal was the highest and best use for the subject property. Furthermore, the intended use of the property complied with each of the special use standards set forth in section 4.3-1 of Schaumburg's general zoning ordinance; namely, the providing of a service or facility for the public's convenience which is not detrimental to the public's health, safety and morals.

George Longmeyer, Schaumburg's Village Manager, testified as an adverse witness under 2-1102. (735 ILCS 5/2-1102 (West 1992).) Longmeyer admitted that, after having reviewed Amoco's application and information relating to the construction plans, he sent a "general comment document" to the Village Planning Department. The comment document included a handwritten note from Longmeyer asking, "[d]o we need additional R-O-W [right of way]? If so, can we get it, i.e., widening of Golf and Roselle Road[s]?" He further stated that Schaumburg had a practice of using the zoning process to secure additional right-of-ways.[4]

Amoco also called Thomas Dabareiner, Senior Transportation Planner for the Village of Schaumburg—and Schaumburg's own traffic impact expert. Although he himself did not conduct any traffic impact studies, Dabareiner stated that the need for roadway improvements at the intersection in question were unrelated to Amoco's proposal. He further acknowledged that the engineering studies calling for the widening of Golf and Roselle roads were prepared prior to Amoco's planned redevelopment.

---

[4] Al Larson, the Village President, likewise conceded that he supported the dedication requirement in order to obtain as much land as possible in order to expedite IDOT's Golf-Higgins-Roselle Triangle Project.

Finally, Thomas Koenig, Schaumburg's Director of Planning, confirmed that Schaumburg had a policy of requiring dedications as a condition of land use permits without regard to whether the need for the exaction related to the proposed use of the property. He acknowledged that Amoco's proposal constituted a significant improvement over the current use of property in terms of traffic impact and landscaping. In the end, Koenig initiated the repealer ordinance in order to facilitate dismissal of the federal litigation.

At the conclusion of the trial, the circuit court ruled against Amoco on count I with respect to the takings issue. The court first noted that the "test to be applied *** in determining whether real estate has been taken for public use within the meaning of the Constitution is whether there has been an actual physical invasion of tangible property." (*Horn v. City of Chicago* (1949), 403 Ill. 549, 87 N.E.2d 642, *cert. denied* and *appeal denied*, *Horn v. City of Chicago* (1950), 338 U.S. 940, 70 S.Ct. 429, 94 L.Ed 429.) The court then remarked that Schaumburg had never actually physically invaded the property, and therefore the dedication requirement did not constitute a taking of property.

As to the zoning issue in count II, the circuit court observed that a municipality may adopt and amend a zoning ordinance as an exercise of police power in order to protect and promote the public welfare. However, the court found that in this case Schaumburg's attempt to revoke the permit was pretextual and served no public purpose. Accordingly, the court held that the repealer ordinance was void under *LaSalle National Bank v. County of Cook* (1957), 12 Ill.2d 40, 145 N.E.2d 65, and further ordered Schaumburg to issue all necessary per-

mits to Amoco in connection with the proposed construction.

On appeal, Amoco submits that the circuit court should have ruled that the dedication requirement constitutes a taking despite the fact that Schaumburg never actually "physically" invaded the property. Amoco further argues that the repealer ordinance was merely a transparent litigation tactic used to divest the federal court of continuing jurisdiction, and therefore the circuit court correctly found that Schaumburg abused its police power. We agree in both respects.

ANALYSIS

The Fifth Amendment to the United States Constitution provides that private property shall not be taken for public use without just compensation. (U.S. Const. amend. V.) This restriction has been made applicable to the states through the Fourteenth Amendment. (*Chicago B. & Q. R. Co. v. Chicago* (1897), 166 U.S. 226, 241, 17 S.Ct. 581, 586, 41 L.Ed. 979.) Article I, Section 15 of the Illinois Constitution contains a similar restriction. Ill. Const. (1970), Art. 1, § 15.

Nevertheless, a municipality may exact some forms of land appropriation without running afoul of either the state or federal takings clauses. (See, *e.g.*, *Agins v. Tiburon* (1980), 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106.) Even so, the government's authority to do so is still circumscribed by the Fifth and Fourteenth Amendments. For example, where a municipality appropriates private property through the dedication of an easement or a right-of-way, a taking may occur requiring compensation. (*Sparks v. Douglas County, et al.* (1995),

127 Wash. 901, 904 P.2d 738, ___.) As the United States Supreme Court reiterated in *Dolan v. City of Tigard* (1994), 512 U.S , 114 S.Ct. 2309, 2137, 129 L.E.2d 304, "[u]nder the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the property sought has little of no relationship to the benefit."

In *Dolan*, the Supreme Court considered the delicate balance between a citizen's right to be compensated when private property is taken for public use and the government's right to regulate land use *vis-a-vis* the acceptable exercise of the police power. In that case, the owner of a plumbing and electric supply store applied to the City of Tigard Planning Commission for a building permit. The purpose of the permit was to improve the existing building and pave a parking lot. The Planning Commission approved the application, but only upon the condition that petitioner dedicate approximately ten percent (10%) of her property as a public greenway and pedestrian/bicycle pathway.

The store owner eventually challenged the dedication requirement on the grounds that her property had been taken without just compensation. The Supreme Court agreed in theory, holding that the exaction could amount to a taking if the reason for the dedication was unrelated to the proposed use of the property. However, because the record did not contain any specific "findings" upon the issue, the Court remanded the matter for further proceedings. Nevertheless, the Court in *Dolan* did establish the appropriate analytical framework for determin-

ing whether a taking has occurred where a municipality grants a permit subject to a dedication of the property.

In reaching its decision, the Supreme Court initially noted that "a land use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not den[y] an owner economically viable use of his land.' *Agins v. Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.E.2d 106 (1980)." The Court, however, distinguished *Agins* and its line of cases from other cases requiring the dedication of property as a prerequisite to permit approval:

> "The sort of land use regulations discussed in the cases just cited, however, differ in two relevant particulars from the present case. First, they involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to conditioning petitioner's application for a building permit on an individual parcel. Second, the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city." *Dolan*, 512 U.S. at ___, 114 S.Ct. at 2316.

The Supreme Court thereafter enunciated a two-part test for determining under what circumstances a condition in a building permit is constitutional. First, a court must ascertain whether there exists an "essential nexus" between a legitimate state interest and the condition. (*Nollan v. California Coastal Commission* (1987), 483 U.S. 825, 837, 107 S.Ct. 3141, 3148, 97 L.Ed.2d 677.) If such a nexus does exist, a court must then decide whether the condition demanded by the government bears the "required degree of connection" to the anticipated impact

of the proposed development. *Dolan*, 512 U.S. at ____, 114 S.Ct. at 2317.

The first part of the test, *i.e.*, the determination of a nexus, requires no advanced degree of analysis and is best illustrated by the seminal case of *Nollan v. California Coastal Commission* (1987), 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677. In *Nollan*, the California Coastal Commission demanded a lateral public easement across private beach front property in exchange for a demolition and construction permit. Upon review, the Supreme Court held the condition unconstitutional on the grounds that there was no essential nexus between the condition and the proposed construction of a three bedroom house. The Court there noted, "[i]t is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the [petitioner's] property reduces any obstacles to viewing the beach created by the new house." (*Nollan*, 483 U.S. at 838, 107 S.Ct. at 3149.) In other words, as the *Dolan* Court explained

> "How enhancing the public's ability to 'traverse to and along the shorefront' served the same governmental purpose of 'visual access to the ocean' from the roadway was beyond our ability to countenance. The absence of a nexus left the Coast Commission in the position of simply trying to obtain an easement through gimmickry, which converted a valid regulation of land into 'an out-an-out plan of extortion'." *Dolan*, 512 U.S. at ___, 114 S.Ct. at 2317, quoting *Nollan*, 483 U.S. at 837, 107 S.Ct. at 3148, quoting *J.E.D. Associates, Inc. v. Atkinson* (1981), 121 N.H. 581, 584, 432 A.2d 12, 14-15.

In essence, then, under the first part of the test, a court must merely determine whether in fact some logi-

cal connection or relationship exists between the proposed use of the property and the condition which the government seeks to impose. It is the second part of the *Dolan* test, *i.e.*, the required degree of connection, which presents more formidable difficulties, and which is at the heart of this case.

After reviewing the decisions from several state courts, including *Pioneer Trust & Savings Bank v. Mount Prospect* (1961), 22 Ill.2d 375, 176 N.E.2d 799, the *Dolan* Court settled upon the "reasonable relationship" test adopted by a majority of jurisdictions.[5] Under this approach, a municipality must show a reasonable relation-

---

[5] In *Pioneer Trust*, our supreme court developed the "specifically and uniquely attributable" test. Under this standard, the government must demonstrate that the imposition of the condition is directly proportional to the specifically created need, lest the exaction be deemed "a veiled exercise of the power of eminent domain and a confiscation of private property behind the defense of police regulations." (*Pioneer Trust*, 22 Ill.2d at 381.) In so holding, the court in *Pioneer Trust* found support in *Rosen v. Village of Downers Grove* (1960), 19 Ill.2d 448, 167 N.E.2d 230, which in turn relied upon *Ayres v. City of Los Angeles* (1949), 34 Cal.2d 31, 207 P.2d 1. We note, however, that the California supreme court has since criticized our supreme court for relying on *Ayres*. (See *Associated Home Builders v. City of Walnut Creek* (1971), 4 Cal.3d 633, 644, 94 Cal. Rptr. 630, 639, 484 P.2d 606, 615.) At any rate, the United States supreme court rejected the "specifically and uniquely attributable" approach because the court did not "think the Federal Constitution require[d] such exacting scrutiny, given the nature of the interests involved." (*Dolan*, 512 U.S. at ___, 114 S.Ct. at 2319.) Therefore, the "specifically and uniquely attributable" test enumerated in *Pioneer Trust* is no longer to be followed when construing the Federal Constitution. However, it remains controlling with respect to our own constitution until the Illinois Supreme Court speaks again on the issue.

ship between the required dedication and the impact of the proposed development. However, the Court rephrased the test in terms of "rough proportionality" so as to avoid confusion with the "rational basis" test found in Equal Protection jurisprudence. The Court concluded, "[w]e think a term such as "rough proportionality" best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Dolan*, 512 U.S. at ___, 114 S.Ct. at 2320-21.

Despite the fact that *Dolan* requires a court to scrutinize the required degree of connection between the exaction and the impact of the development, *Dolan* itself does not represent a seismic departure from traditional takings jurisprudence. In fact, from an analytical point of view, *Dolan* merely reflects the culmination of a logical progression of the unanswered question in *Nollan*, *i.e.*, if there is a nexus, just how compelling must the nexus be? *Dolan* simply tells us that the imposition of the dedication must be roughly proportionate to the property's intended use.

Thus, in order for the exaction at issue here to pass constitutional muster under the Federal Constitution, the dedication required by Schaumburg must be roughly proportionate to the razing of the current Amoco station, the erection of a "prototypical food shop", the reconfiguration of the "pump islands", the elimination of two driveways, and the addition of an overhead canopy. That dedication consists of twenty eight (28) feet of additional right-of-way along Golf Road and ten (10) feet of addi-

tional right-of-way along Roselle Road, as well as a forty (40) foot triangular section of right-of-way immediately contiguous to the intersection.

Schaumburg contends that "the nexus would have existed because the dedication requirement originally imposed related to the state interest of the highway improvement. The proportionality existed because the dedication was directly related to the land sought to be improved, by the special use." This rather specious contention, however, is belied by the record in this case. After having reviewed the evidence submitted at trial, the circuit court stated at length:

> "The Village [Schaumburg] has argued that both [the] dedication requirement and the revocation of the special use permit were necessary to protect [the] public welfare. The dedication requirement would serve to alleviate traffic problems, and the repeal of the ordinance was in order to ensure that Schaumburg had an adequate number of service stations. However, the evidence presented at trial underscored the insignificance of these so called concerns.
>
> Metra Transportation engineering firm which conducted an analysis of the Amoco proposal found that the Golf-Roselle intersection could adequately accommodate any new traffic[,] that any such additional traffic would be minimal. Thomas Debarener [sic], Transportation Planner for the Village testified that upon review this assessment, he did not object to Metra's findings.
>
> Moreover, Mr Koenig, Head of the Schaumburg Planning Commission testified that the Village never conducted a traffic study in connection with the property dedication requirement.
>
> * * *

> In sum, the Village has offered nothing to suggest that the denial of the special use permit serves to protect the public welfare. In contrary, the issue of increasing traffic congestion and the need for additional service stations amounts [sic] to little more than pretextual excuses offered subsequent to the enactment of the repealer ordinance, and in order to insulate the Village from claims that it act[ed] in retaliation for Amoco's failure to concede to the dedication requirement and that it wielded its zoning power unreasonably.
>
> Therefore, the evidence shows that no public purpose was served by the initial dedication requirement or by the repeal[er] ordinance."

We acknowledge that the circuit court made these comments in connection with its ruling on count II. Nevertheless, they highlight the fact that Schaumburg attempted to expropriate over twenty percent (20%) of Amoco's property without a legitimate reason. In fact, the record is replete with evidence showing that the required dedication had little or no relationship to the anticipated impact of the proposed development. For example, in addition to the testimony cited by the circuit court, Kenneth Hemstreet also testified that Amoco's proposed improvements would have had no effect on the need to increase the number of lanes for both Golf and Roselle roads. In fact, according to Hemstreet, IDOT recommended widening the streets notwithstanding the redevelopment of Amoco's property.

Despite this evidence, the circuit court nevertheless found that Schaumburg's actions did not result in a taking of Amoco's property solely because there was no actual physical invasion of tangible property. In reaching this conclusion, the circuit court relied exclusively on

Horn v. City of Chicago (1949), 403 Ill. 549, 87 N.E.2d 642, *cert. denied* and *appeal denied*, *Horn v. City of Chicago* (1950), 338 U.S. 940, 70 S.Ct. 429, 94 L.Ed 429. We find the factual context of *Horn*, however, too far removed from the instant case to be controlling.

In *Horn*, the owners of private property sought to recover damages from the city of Chicago arising out of the city's construction of the Wabash Avenue viaduct. The construction itself only abutted plaintiffs' property and therefore did not result in any physical invasion of the property. The supreme court denied relief, noting that "[t]he test applied by this court and also by the Federal court, in determining whether real estate has been taken for public use within the meaning of our constitution, is whether there has been an actual physical invasion of the tangible property." (*Horn*, 403 Ill. at 554.) In support of this proposition, the court cited *People ex. rel. Pratt v. Rosenfield*, 399 Ill.247, 77 N.E.2d 697; *Kane v. City of Chicago*, 392 Ill. 172, 64 N.E.2d 506; *People ex. rel. Tyson v. Kelly*, 379 Ill. 297, 40 N.E.2d 510; *Cuneo v. City of Chicago*, 379 Ill. 488, 41 N.E.2d 473; *Barnard v. City of Chicago*, 270 Ill. 27, 110 N.E. 407; *Otis Elevator Co. v. City of Chicago*, 263 Ill. 419, 105 N.E. 338; *Schroeder v. City of Joliet*, 189 Ill. 48, 59 N.E. 550; and *Northern Transportation Co. v. City of Chicago*, 99 U.S. 635, 25 L.Ed. 336. (*Horn*, 403 Ill. at 554.) However, the court in *Horn* immediately pointed out that, in each of the cases cited, there had been no attempt by the sovereign authority to appropriate or use the abutting owner's property for public purposes.

In contrast, Schaumburg here attaches a dedication requirement to the issuance of a special use permit which, if accepted, would result in the loss of twenty (20%) of

Amoco's property. Thus, unlike *Horn*, which merely involved a potential decline in value of an owner's abutting property as a result of a municipality's development of its own property, there is an actual taking of Amoco's property for public use. To be sure, the exaction of property in this case is the quintessential physical invasion of private property.[6] It is not simply a reduction in, or limitation upon, Amoco's use of its property, but it is a permanent loss of the property itself. As such, the dedication requirement here necessarily strikes at the cornerstone of the takings clause, and is exactly the type of exaction which the courts have repeatedly subjected to a takings analysis. *Nollan v. California Coastal Commission* (1987), 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677; *Dolan v. City of Tigard* (1994), 512 U.S ___, 114 S.Ct. 2309, 129 L.Ed.2d 304; *Sparks v. Douglas County, et al.* (1995), 127 Wash. 901, 904 P.2d 738; *Schultz v. City of Grants Pass* (1994), 131 Or.App. 220, 884 P.2d 569; *Hernando County v. Budget Inns of Florida, Inc.* (1990), ___ Fla. ___, 555 So.2d 1319; and *Rohn v. City of Visalia* (1989), 214 Cal.App. 3d 1463, 263 Cal.Rptr. 319.

Schaumburg nevertheless insists that *Dolan* and its progeny do not apply to the present case on the grounds

---

[6] (See *Clajon Production Corp., et al. v. Petera, et al.* (10th Cir. 1995), ___ F.3d ___, ___, 1995 U.S.App. Lexis 32528 (Nos. 94-8071 and 94-8103) ("*Nollan* and *Dolan* essentially view the conditioning of a permit based on the transfer of a property interest—i.e., an easement—as tantamount to a physical occupation of one's land. *** Thus, we believe that *Nollan* and *Dolan* are best understood as extending the analysis of complete physical occupation cases to those situations in which the government achieves the same end (i.e., the possession of one's physical property) through a conditional permitting procedure.")

that its actions were purely legislative in nature rather than adjudicative. Schaumburg thus apparently believes that it may skirt its obligation to pay compensation when taking private property for public use merely by having the Village Board of trustees pass an "ordinance" rather than having a planning commission issue a permit. We disagree.

In *Parking Association of Georgia v. City of Atlanta* (1994), 264 Ga. 764, 450 S.E.2d 200, *cert. denied*, ___ U.S. ___, 115 S.Ct. 2268, 132 L.Ed.2d 273, the city of Atlanta enacted a zoning ordinance pertaining to parking lots with 30 or more spaces in several downtown and midtown zoning districts. The ordinance required minimum barrier curbs and certain specified landscaping. The purpose of the ordinance was to improve the city's aesthetic appeal, promote public safety, and ameliorate problems with air quality and water run off. The supreme court of Georgia upheld the ordinance under state law. More important for present purposes, however, the court also held that the ordinance did not constitute a taking even under the "federal takings analysis." Specifically, the court observed in a footnote:

> "Plaintiff's reliance upon *Dolan v. City of Tigard*, 512 U.S. ___, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994), is misplaced. In that case, the city required an applicant for a building permit to deed portions of her property to the city. The Supreme Court held the required dedication violated the Takings Clause because the city did not 'make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the development.' *Id.* at ___, 114 S.Ct. at 2319. Here the city made a legislative determination with regard to many landowners and it simply limited the use the

> landowners might make of a small portion of their lands. Moreover, the city demonstrated a 'rough proportionality' between the requirements and objectives of the ordinance." *Parking Association of Georgia*, 450 S.E.2d at 203, n.3.

The plaintiff, however, subsequently appealed to the United States Supreme Court on writ of certiorari. Although a majority of the court denied the writ (*Parking Lot Association of Georgia v. City of Atlanta* (1995), ___ U.S. ___, 115 S.Ct. 2268, 132 L.Ed.2d 273), Justice Thomas, with whom Justice O'Connor joined, issued a written dissent. In the dissent, Justice Thomas initially pointed out that the lower courts are in conflict over whether *Dolan's* test should be applied in cases where the alleged taking occurs through an act of the legislature. In addition to *Parking Association of Georgia*, the federal district court in *Harris v. City of Wichita* (D.Kan. 1994), 862 F.Supp. 287, concluded that *Dolan* was inapposite and the less stringent *Agins* standard should apply.[7] On the other hand, both *Trimen Development Co. v. King County* (1994), 124 Wash.2d 261, 877 P.2d 187, and *Manocherian v. Lenox Hill Hospital* (1994), 84 N.Y.2d 385, 618 N.Y.S.2d 857, 643 N.E.2d 479, *cert. denied*, (1995), ___ U.S. ___, 115 S.Ct. 1961, 131 L.Ed.2d 853, applied *Dolan* to a purported legislative taking. Justice Thomas then wrote:

---

[7] See also *San Mateo County Coastal Landowners' Association v. San Mateo* (1995), 38 Cal.App.4th 523, 45 Cal. Rptr. 2d 117; *Home Builder's Association of Central Arizona v. City of Scottsdale* (1995), ___ Ariz ___, 902 P.2d 1347; and *Waters Landing Limited Partnership v. Montgomery-County* (1994), 337 Md. 15, 650 A.2d 712.

> "It is hardly surprising that some courts have applied *Tigard's* [i.e., *Dolan's*] rough proportionality test even when considering a legislative enactment. It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking. A city council can take property just as well as a planning commission can. Moreover, the general applicability of the ordinance should not be relevant in a takings analysis. If Atlanta had seized several hundred homes in order to build a freeway, there would be no doubt that Atlanta had taken property. The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference." *Parking Association of Georgia v. City of Atlanta* (1995), ___ U.S. at ___, 115 S.Ct. at 2268-69, 132 L.Ed. 2d at ___ (Thomas, J., dissenting).

Although not binding as precedent, we find Justice Thomas' comments particularly persuasive and consonant with the rationale underlying *Dolan* and similar cases. Certainly, a municipality should not be able to insulate itself from a takings challenge merely by utilizing a different bureaucratic vehicle when expropriating its citizen's property.

In addition, we also note that the so-called "ordinance" at issue here did not itself reflect a uniformly applied legislative policy. Indeed, the dedication requirement was clearly site-specific and adjudicative in character. As such, even if we were to recognize the distinction between legislative and adjudicative actions, which we are not inclined to do under the circumstances of this case, we would still apply the two-part approach set forth in *Dolan*, as the court did in *Schultz v. City of Grants Pass* (1994), 131 Or.App. 220, 884 P.2d 569.

In *Schultz*, a strikingly similar case, the City of Grants Pass approved an application to partition a parcel of private property subject to a dedication requirement. Specifically, the approved application required the property owner to dedicate a 10 foot right-of-way along the portion of both parcels abutting Beacon Drive, a 25 foot right-of-way along the portion of both parcels abutting Savage Street, as well as an unspecified footage sufficient enough "to round the intersection." The property owner challenged the city's actions under the federal takings clause. The trial court entered judgment in favor of the city, and petitioner appealed.

In reversing the trial court, the appellate court rejected the city's contention that *Dolan* does not apply. The city had argued that "because the relevant ordinances *require* the imposition of such conditions, the decision to do so is, in reality, a legislative one." (*Schultz*, 884 P.2d at 573.) (Emphasis in the original.) Instead, the court stressed that:

> "the character of the restriction remains the type that is subject to the analysis in *Dolan*. In drawing its distinction between the legislative land use decisions that are entitled to a presumption of validity and the exactions that are not, the Supreme Court noted that what triggers the heightened scrutiny of exactions is the fact that they are 'not simply a limitation on the use' to which an owner may put his or her property, but rather a requirement that the owner deed portions of the property to the local government. [Citation omitted] That is precisely the nature of the exaction imposed by the city in this case." (*Schultz*, 884 P.2d at 573.)

It is also precisely the nature of the exaction in the instant case.

Applying *Dolan*, the court in *Schultz* went on to hold the exactions did not satisfy the rough proportionality requirement because "an increase of eight vehicle trips on Beacon Drive and Savage Street each day hardly justifies requiring petitioners to part with 20,000 square feet of their land without compensation. That does not comport with what the Supreme Court meant by 'rough proportionality.' " *Schultz*, 884 P.2d at 573; see also, *J.C. Reeves Corporation v. Clackamas County* (1994), 131 Or.App. 615, 887 P.2d 360.

Like the court in *Schultz*, we find that Schaumburg's exaction of over twenty percent (20%) of Amoco's property on the basis of a *de minimis* increase in street traffic—four-tenths of one percent (0.4%)—does not correspond with the slightest notions of rough proportionality. Clearly, because we find that the dedication requirement does not satisfy the more lenient rough proportionality test for the Federal Constitution, it follows that it also did not satisfy the specifically and uniquely attributable approach with respect to the State Constitution. *Pioneer Trust & Savings Bank v. Mount Prospect* (1961), 22 Ill.2d 375, 176 N.E.2d 799.

At any rate, relying on *Goffinet v. County of Christian* (1976), 65 Ill.2d 40, 357 N.E.2d 442, Schaumburg proclaims that Amoco's refusal to unconditionally "accept" the dedication requirement terminated the special use permit. We disagree.

In *Goffinet*, our supreme court held that where a Zoning Enforcing Officer has declared the a holder of a *validly* enacted special use permit is no longer utilizing the property in accordance with conditions set forth in the permit, the use terminates and the property reverts to its prior zoning classification. (*Goffinet*, 65 Ill.2d at 53.)

We simply fail to see the relevance of *Goffinet*. Amoco has not been permitted to redevelop the property as it intended, and thus obviously a zoning enforcing officer has not declared Amoco in violation of its special use permit. Indeed, the very issue in this case is whether Schaumburg has in fact enacted a *valid* special use permit. How Amoco's unwillingness to part with twenty percent (20%) of its property without receiving its constitutionally mandated just compensation is the equivalent of an Enforcing Officer's declaration of non-compliance is beyond our comprehension.

In sum, we hold that Schaumburg's attempted exaction of twenty-eight (28) feet of right-of-way along Golf Road and ten (10) feet of right-of-way along Roselle Road, as well as the forty (40) foot triangular section of right-of-way adjacent to the intersection, constitutes a taking under both the Fifth Amendment of the United States Constitution and Article I, Section 15 of the Illinois Constitution.

We next address whether the circuit court erred in ruling that the repealer ordinance was an arbitrary and capricious act and therefore did not constitute a legitimate exercise of Schaumburg's police power. In this regard, Schaumburg submits that in "judging the propriety of a denial of the special use here [in other words, the repealer ordinance], the trial court was to utilize [which it did] the criteria set forth in *LaSalle National Bank v. County of Cook* (1957), 12 Ill.2d 40, 46-47, [145 N.E.2d 65]." Schaumburg, however, misreads *LaSalle*.

In *LaSalle*, a property owner challenged a zoning ordinance which restricted the use of certain property to single family residences of less than 10,000 square feet. In upholding the ordinance, the supreme court consid-

ered six factors relevant in determining the validity of a particular type of zoning for a particular area. Those six factors included: (1) the existing uses and zoning of nearby property, (2) the extent to which property values are diminished by the particular zoning restrictions, (3) the extent to which the destruction of property values promotes the health, safety, morals or general welfare of the public, (4) the relative gain to the public as compared to the hardship imposed upon the individual property owner, (5) the suitability of the subject property for the zoned purposes, and (6) the length of time the property has been vacant as zoned considered in the context of land development in the area in the vicinity of the subject property.

In the present case, however, the original ordinance granting Amoco a special use permit is not the dispositive issue in the case. Even if it were, there is little doubt that Amoco's proposed use of the property satisfied the factors enumerated in *LaSalle*.[8] For example, Allen Kracower, a urban planner and landscape architect, testified that Amoco's proposal was the highest and best use of the property, and further that it did not detrimentally

---

[8] Since the Board of Trustees in granting the special use permit found Amoco satisfied all of the standards set forth in Schaumburg's zoning ordinance, and since there was no appeal of the special use prior to the repealer ordinance, we question whether a *de novo* trial requiring proof of the *LaSalle* factors is even necessary. Our concern stems from the common sense reason that, if the Village Board found that all of the standards justifying the issuance of the special use permit have been satisfied, except the conditional dedication, the Board ought hardly to be able to require *de novo* proof of those factors again merely because of Amoco's refusal to comply with the conditional dedication that, under the law, is unconstitutional.

effect the public's health, safety and welfare. Thomas Koenig, Schaumburg's own Director of Planning, conceded that Amoco's intended use of the property constituted a significant improvement over the current use of the property.

In any event, unlike *LaSalle*, the controlling issue in this case is not the impact of a particular type of zoning upon a particular piece of property. Rather, the issue here is whether a municipality may repeal a zoning ordinance solely on the grounds that the putative holder of a special use permit failed to comply with an unconstitutional exaction of property. We hold that it may not.

We are not unmindful, of course, that matters relating to zoning lie primarily within the discretion of the municipality, and it is not the province of the courts to interfere with that discretion unless the action of the municipality is shown to be unrelated to the public welfare. (*Treadway v. City of Rockford* (1962), 24 Ill.2d 488, 493-94, 182 N.E.2d 219.) So too, it is well established that a municipality may adopt or amend zoning ordinances "in order to promote and protect the public health, safety, morals, comfort and general welfare of the people. *St. Lucas Association v. City of Chicago* (1991), 212 Ill. App. 3d 817, 822, 571 N.E.2d 865.

Nevertheless, the circuit court in this case specifically found that "no public purpose was served *** by the repealer ordinance." This finding was predicated upon the fact that Schaumburg had previously approved of Amoco's application for redevelopment, only to later rescind its approval, not because conditions relating to the property had changed, but because Amoco refused to comply with an unconstitutional taking of its property without receiving just compensation. Amoco's filing suit

in federal court only made matters worse. While on the stand, Thomas Koenig, Schaumburg's Director of Planning, was asked the following questions and gave the following answers:

> "Q. Does [the transcript of the hearing before the Zoning Board of Appeals] refresh your recollection as to whether you told the Zoning Board that the reason the amendment was being proposed was to, in the Village Attorney's opinion, help you get the case out of Federal Court?
>
> A. Yes.
>
> Q. And that, in fact, was the reason that you were proposing it, was it not?
>
> * * *
>
> A. Yes."

Schaumburg eventually succeeded in passing the repealer ordinance and dismissing the case from federal court. Of course, perhaps from a perverted point of view, obtaining dismissal of litigation by a legislative slight of hand serves to promote the public's interest, at least as far as Schaumburg is concerned. But we do not think the passage of the repealer ordinance under the circumstances of this case promotes and protects "the public health, safety, morals, comfort and general welfare of the people. *St. Lucas Association v. City of Chicago* (1991), 212 Ill. App. 3d 817, 822, 571 N.E.2d 865.

Accordingly, we affirm the circuit court's finding that Schaumburg's attempt to revoke the permit did not qual-

ify as a reasonable exercise of Schaumburg's legislative authority, police powers notwithstanding.[9]

As a final matter, Schaumburg contends that the circuit court erred in admitting the record of the proceedings before the Zoning Board of Appeals. Although we agree with Schaumburg that the transcripts of such hearings are generally not admissible in a declaratory action (*Knor v. County of Madison* (1986), 151 Ill. App. 3d 767, 773, 502 N.E.2d 1063, *appeal denied*, *Knor v. County of Madison* (1987), 114 Ill.2d 547, 508 N.E.2d 729 (admission of such evidence would deprive a party of his or her right to have primary evidence or direct evidence presented for evaluation by the court); *Yusuf v. Village of Villa Park* (1983), 120 Ill. App. 3d 533, 543, 458 N.E. 2d 575), the record here discloses that the circuit court refused to admit the transcripts as *substantive* evidence. In fact, not only did the court sustain an objection to Amoco's exhibit #12, the transcript of the proceedings before the Zoning Board of Appeals, but the court also sustained an objection to Amoco's exhibit #13, the Zoning Board minutes. What the court did was merely to admit party admissions showing that the dedication requirement was unrelated to the impact of the proposed development and that the subsequent repealer ordinance was enacted solely in response to Amoco's refusal to acquiesce in the unconstitutional expropriation of its property.

---

[9] We note that, in conjunction with the repealer issue, the circuit court likewise found that no public policy was served by the original dedication requirement. Based upon our review of the record, we hold that the circuit court's finding was not against the manifest weight of the evidence, and we therefore also affirm that portion of the court's decision striking the dedication requirement.

Such admissions accord with *Village of Skokie v. Gianoulis* (1994), 260 Ill. App. 3d 287, 299, 632 N.E.2d 106. Schaumburg's remaining contentions regarding the admissions of certain other exhibits are unpersuasive and do not merit further discussion.

For the foregoing reasons, we affirm the circuit court in part, reverse in part, and remand the matter for further proceedings consistent with this opinion.

Affirmed in part; reversed in part; and remanded.

T. O'BRIEN, J., with COUSINS, P.J., and MCNULTY, J., concurring.

[Dated September 16, 1994]

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

AMOCO OIL COMPANY, a Maryland corporation,	)	
Plaintiff,	)	
v.	)	No. 92 CH 11223
VILLAGE OF SCHAUMBURG, a municipal corporation,	)	Judge John N. Hourihane
Defendant.	)	

FINAL JUDGMENT ORDER

This cause coming before the Court for judgment and decision following trial, and the Court having reviewed the pleadings and memoranda filed by the parties hereto, having heard the evidence presented in the trial of this cause, having heard final argument of counsel and being otherwise fully advised in the premises:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that for the reasons set forth in the Court's oral findings and decision on September 13, 1994, which reasons and findings are incorporated herein by reference:

1. Judgment is entered in favor of defendant Village of Schaumburg and against plaintiff Amoco Oil Company on Count I.

2. Judgment is entered in favor of plaintiff Amoco Oil Company and against defendant Village of Schaumburg on Count II. Defendant Village of Schaumburg is hereby

ordered to issue all necessary building and related permits necessary to authorize plaintiff Amoco Oil Company to construct a Type C gas station on the Subject Property in accordance with the Site Plan, specifications and related documents submitted at the trial of this cause.

This is a Final Order and there is no cause or reason to delay enforcement or appeal of this Order.

DATED this 16th day of September, 1994.

ENTER:

o/s John N. Hourihane

THE HONORABLE JOHN N. HOURIHANE

JOHN B. MURPHEY
ROSENTHAL, MURPHEY, COBLENTZ & JANEGA
30 N. LaSalle St. Suite 1624
Chicago, IL 60602
(312) 541-1072
Attorney for Plaintiff
Atty. No. 16360

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT—CHANCERY DIVISION

AMOCO OIL COMPANY	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 94 CH 11223
	)	
VILLAGE OF SCHAUMBURG	)	
	)	
Defendant.	)	

EXCERPT OF THE PROCEEDINGS of the above-entitled cause, before the Honorable JOHN N. HOURIHANE, Judge of said Court, on Tuesday, the 13th day of September, 1994, at the hour of approximately 10:00 o'clock a.m.

PRESENT:

MR. JOHN MURPHY

appeared on behalf of the Plaintiff.

MR. JACK SIEGEL

appeared on behalf of the Defendant.

NOELLE M. FIGUEROA, C.S.R.
Official Court Reporter
Chancery Division
Circuit Court of Cook County

THE CLERK: 92 CH 11223, Amoco Oil versus Village of Schaumburg.

MR. MURPHY: John Murphy for plaintiff.

MR. SIEGEL: Jack Siegel for defendant.

THE COURT: This matter is before the court for ruling on the plaintiff Amoco Oil Company, two count complaint for preliminary injunction and other relief brought against the defendant, Village of Schaumburg.

Count I alleges an uncompensated taking and Count II alleges an unconstitutional zoning decision. The Village has filed an answer and set forth affirmative defenses. This case rises out of a request by Amoco for a special use and variation for an existing gas line service station located at the northeast corner of Golf and Roselle Road in Schaumburg. Under the Zoning Ordinance of the Village of Schaumburg, the subject property is zoned for the B-2 general retail business district.

The Zoning Ordinance also places the gasoline stations in various classifications. Amoco's existing gas station was classified as a Type "A" automobile service station, which is characterized as a full service filling station. Because Amoco sought to modify from a gas station which provides automobile service to one which offered only gasoline and ancillary products, the Zoning Ordinance required Amoco to obtain a special use permit for a Type "C" station. Amoco proposed to improve the property by raising the existing building and replacing it as a prototypical food shop structure: Reconfiguring the pump islands, eliminating two of the driveways, landscaping the site and constructing an overhead canopy.

Prior to its formal application for a special use permit, Amoco learned that it may be required to dedicate twen-

ty feet of its property along Golf and Roselle Roads, as well as a forty by forty foot triangular section at the intersection to the Village as a condition of any improvement. This dedication was understood to be in contemplation of a future reconstruction of the Golf-Roselle intersection. In 1990, Amoco made a formal petition to obtain the requisite special use permit and the site plan approval for the station.

The Zoning Board conducted a public hearing on February 20th, 1991. On July 9th, 1991, the Village Board adopted Ordinance number 91-78 providing for a special use for a Type "C" automobile service station. The ordinance included the condition that prior to the issuance of a building permit, Amoco provided the dedication of 28 feet of right-of-way along Golf Road, ten feet of right-away along Roselle Road and a 48 foot section immediately contiguous to the intersection. Refusing to comply with the condition requiring that dedication, Amoco filed a lawsuit challenging the Village's action in the United State's District Court for the Northern District of Illinois and seeking issuance of the preliminary injunction. The motion for a conjunctive relief was denied on the grounds that there was inadequate remedy at law and no threat to permanent damage.

On November 12th, 1991, the Village adopted,—the Village Board adopted an ordinance repealing the original ordinance granting the special use. On September 9th, 1992, Amoco amended the complaint in Federal Court. It was dismissed on the grounds that Amoco had an adequate remedy in the Circuit Court of Cook County.

In Count I of its complaint, it is Amoco's position that the imposition of the dedication condition amounts to a taking of property without just compensation and vio-

lation of the 5th and 14th Amendment of the United States Constitution. Count I further alleges that the repealed ordinance was passed solely because Amoco would not make the subject uncompensated conveyance, and is therefore an abuse of the municipalities' police power and unconstitutional taking. In Count II, Amoco contains that the repealer ordinance is arbitrary and unreasonable, and thus in violation of Amoco's due process rights under the State and Federal Constitutions.

Amoco requests that this Court declare that the dedication condition imposed via the initial ordinance amounts to an unconstitutional taking that the repealer ordinance was adopted solely in retaliation for Amoco's refusal to accept said condition, and that the repealer ordinance is null and void. It is the Village's position that there has been no unconstitutional taking because there has been no per se physical invasion of the property, and that the Village's decision not to grant a special use permit was reasonable and justified especially in light of the presumption of validity as to such legislative municipality. Accordingly, the Village submits that the taking question is moot by virtue of the repeal of the special use permit, and that Amoco will not be able to meet its burden of proving the invalidity of the Zoning Ordinance by clear and convincing evidence.

This Court having conducted a trial on the merits of the complaint, having considered the testimony of the witnesses, exhibits entered into evidence and the arguments of counsel, as well as having reviewed memoranda submitted by the parties finds as follows: the issue as raised in Count I of Amoco's complaint is whether the dedication requirement attached to the issuance of the special use permit constitutes an unconstitutional taking.

The test to be applied by Courts in determining whether real estate has been taken for public use within the meaning of the Constitution is whether there has been an actual physical invasion of tangible property. Horn versus City of Chicago, 403 Ill. 549. In order to constitute a taking compensable through eminent domain, there must be a physical taking of the property.

Here, Amoco has made no showing that a taking occurred. Rather the Village enacted an ordinance whereby Amoco was given a physical use permit which was conditioned on the dedication. That ordinance was subsequently repealed pursuant to municipalities' exercise of its police power. The Village has not physically invaded Amoco's property, nor has it denied Amoco economically viable use of the premises.

In sum, the repeal of the initial ordinance eliminated any threat or claim of the taking. The issue as raised in Count II of the amended complaint is whether the adoption of the repeal ordinance is arbitrary and unreasonable, and thus this is a violation of Amoco's due process rights. In Illinois, it is well established that a municipality may adopt and amend the Zoning Ordinance as an exercise of the police power in order to protect the public health, safety, morals and comfort and general welfare. Jeisy versus City of Taylorville, 81 Ill. App. 3d 442.

To that end, the Zoning Ordinance carries a presumption of the validity, and a person who challenges this presumption has the burden of establishing by clear and convincing evidence with respect to his property,—the ordinance is arbitrary, capricious and unreasonable and bears no substantial relation to public welfare. St. Lucas Association versus City of Chicago, 212 Ill. Apr,. 3d, 817.

And LaSalle National Bank versus County of Cook, 12 Ill. 2d 40. Illinois Supreme Court set forth the factors the Court is to consider in determining the validity of the Zoning Ordinance, 1) the existing uses and zoning of nearby property, 2) the extent to which property values are diminished by the particular restrictions, 3) the extent to which the destruction of the property value promotes the health, safety and morals and general welfare of the public, 4) the relative gain to the public as compared to the hardship imposed upon the individual property owner, 5) the suitability of the subject property for its zoned purposes and 6), the length of time the property has been vacant and zoned considered in the context of land development in the area, in the vicinity of the subject property.

Additional factors for the Court may consider the community, the need for the proposed use and care for which the community is undertaken to plan its land for development. Sinclair Pipe Line Company versus Village of Richton Park, 19 Ill. 2d 370. The foregoing applied to the testimony and evidence presented at trial lead to the conclusion that the Village's repeal of the special use permit was a clear abuse of municipal zoning power.

The first factor to be considered is whether the property is zoned in conformity with the surrounding existing uses and whether those uses are uniform and established. Although no LaSalle Factor is controlling, the Court's have recognized this factor to be of paramount importance. LaGrange State Bank versus County of Cook, 75 Ill 2nd 301.

From a review of the plaintiff's exhibits consisting of various sites, maps, etc., it is obvious that the entire area surrounding the subject property is commercial in

nature and is zoned B-2 for zoning business purposes. Secondly, two of the lots adjacent to the Golf-Roselle intersection are utilized for mini-mart stations as the subject property is within the B-2 Zoning, and mini-mart filling stations are permitted within such areas. The proposed use is wholly in accordance with the zoning plan and in conformity with the surrounding area.

Concerning the diminishment of property value, Amoco's expert witness Allen Krakower testified that the use of property for mini-mart filling stations would be in the best, would be the best and highest use given the configuration of the site as well as the limited space for parking which some other use may require. Also, Krakower states that there was, there were a substantial number of service stations as well as dealerships providing repair services in the area and already operating within the Village, thereby abrogating a pressing need for additional automobile maintenance facilities. In sum, the value of the property is substantially decreased by requiring Amoco to use its property solely as a service station.

The third and fourth LaSalle factors are frequently considered together. These factors require the Court to consider the hardship the restriction imposes on an owner in light of the extent to which the existing zoning promotes the general health, safety and welfare of the public. These factors require the Court to determine whether the relative gain to the public outside any hardship imposed on the owner. The Village has argued that both dedication requirement and the revocation of the special use permit were necessary to protect public welfare. The dedication requirement would serve to alleviate traffic problems, and the repeal of the ordinance was in order

to ensure that Schaumburg had an adequate number of service stations. However, the evidence presented at trial underscored the insignificance of these so called concerns.

Metra Transportation engineering firm which conducted an analysis of the Amoco proposal found that the Golf-Roselle intersection could adequately accommodate any new traffic that any such additional traffic would be minimal. Thomas Debarener, Transportation Planner for the Village testified that upon review of this assessment, he did not object to Metra's findings.

Moreover, Mr. Koenig, Head of the Schaumburg Planning Commission testified that the Village never conducted a traffic study in connection with the property dedication requirement. As to the need for a filling station with service bays, Koenig went on to testify that such an issue was never a concern before the zoning board. As noted above, Krakower testified that there were seventy to eighty businesses within the Village that performed some form of automobile maintenance and repair.

In the minutes of the board meetings, there is no reference to or discussion concerning the need for additional service stations within the Village. Rather, the issues appear to have arose only after Amoco filed suit in Federal Court. Conversely, Koenig stated that the Amoco proposal met all the technical aspects of the Village comprehensive zoning plan.

Al Larson, the Village President testified that the repeal ordinance was a result of Amoco's failure to capitulate to the dedication requirement, further emphasizing the Village's underlying motives in connection with the initial ordinance and memorandum dated November 7th,

1991. Koemig states that the dedication requirement would serve to expedite the future road improvements.

In sum, the Village has offered nothing to suggest that the denial of the special use permit serves to protect the public welfare. In contrary, the issue of increasing traffic congestion and the need for additional service stations amounts to little more than pretextual excuses offered subsequent to the enactment of the repealer ordinance, and in order to insulate the Village from claims that it act in retaliation for Amoco's failure to concede to the dedication requirement and that it wielded its zoning power unreasonably.

Therefore, the evidence shows that no public purpose was served by the initial dedication requirement or by the repeal ordinance. In the balance, only Amoco bore any hardship that it was prohibited from utilizing its property for the highest and best use. Concerning the remaining factors, clearly the property is suitable for a filling station food mart within the B-2 Zoning, and the issue is whether the property is vacant or unsalable is irrelevant here.

Based on the foregoing, it is the determination of this Court that while the Village's conduct never amounted to an unconstitutional taking. Further, Amoco has proven by clear and convincing evidence that the repeal of the ordinance granting Amoco a special use permit was arbitrary, capricious and unreasonable pursuant to the factors set forth in LaSalle Bank. Accordingly, judgment is entered in favor of the Village on Count I and in favor of the plaintiff's on Count II.

To that end, this Court declares Amoco's proposed use in an improvement of its property is a reasonable use as

contemplated by the Village Zoning plan, and the Village is ordered to issue to Amoco upon a appropriate application all necessary permits in order to facilitate the proposed modification and construction.

Prepare a written order. I'm ruling for the defendant on Count I of the complaint. I'm ruling for the plaintiff on Count II of the complaint. For the reasons I've stated of record, there is no just reason to delay enforcement or appeal of this order. The remaining exhibits are in my chambers.

MR. SIEGEL: There is one question here. We had bifurcated this case with respect to damage claims. That may have arisen out of Count I. I don't know. If Amoco is going to pursue that, then I think,—

MR. MURPHY: Judge, with respect to that, I would just like to review my pleading or that issue where my claim for damages attaches only to Count I in this case. We would have a final order.

THE COURT: Let me say this. You can review it and I've reviewed it. And I believe at this juncture, unless I'm convinced otherwise, I concur with counsel that the damage is applicable to Count I.

MR. SIEGEL: This will be a final order.

THE COURT: I'll give him a chance to show me where I'm wrong. Just to have it straight up front, I believe that the damages claim arise out of Count I, not out of Count II.

MR. SIEGEL: Maybe the best thing to do is come back to court, maybe tomorrow or the next day and work it out between ourselves. I take it that the order would simply be to grant judgment on Count I, judgment for

Amoco on Count II, order us to issue the permit for the persons stated in your Honor's oral ruling in open court which is made part of the order.

THE COURT: I think you've done this before.

MR. SIEGEL: Sometimes I win though.

(Whereupon, which were all the proceedings had on the hearing of the above-entitled cause.)

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

I, Noelle M. Figueroa, an Official Court Reporter for the Circuit Court of Cook County, County Department, Chancery Division, do hereby certify that I reported in shorthand the excerpts of proceedings had at the hearing in the above-entitled cause; that I thereafter caused the foregoing to be transcribed into typewriting, which I hereby certify to be a true and accurate transcript of the excerpts of proceedings had before the Honorable JOHN N. HOURIHANE, Judge of said court.

o/s Noelle M. Figerora

Official Court Reporter
CSR #084-003547

Dated this 15th day
of September, 1994.

[Dated September 9, 1992]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

AMOCO OIL CO,	)	
	)	
Plaintiff,	)	
	)	
v.	)	NO. 91 C 4973
	)	
VILLAGE OF SCHAUMBURG,	)	HONORABLE
	)	JAMES B. ZAGEL
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Amoco Oil Co. applied for a special use permit from the Village of Schaumburg, in order to modernize its service station on the corner of Golf and Roselle Roads. Amoco intended to convert the facility from a full service station into a self service station with a minimart. The Village approved the plan and issued the special use permit, but with a condition that Amoco dedicate twenty-eight feet of property along Golf Road and ten feet along Roselle Road and a forty by forty foot triangle at the intersection. The proposed dedication amounted to over twenty per cent of Amoco's property, and Amoco protested the requirement at a public hearing before the permit issued. The Zoning Board of Appeals voted to approve the plan without the dedication, but the Village Board of Trustees enacted an ordinance conditioning the permit on the twenty per cent dedication.

The purpose behind the dedication, according to the Board of Trustees, is to save taxpayers money. The Illi-

nois Department of Transportation has a plan to widen Golf and Roselle Roads from four to six lanes in the future, in order to alleviate traffic conditions; if the Village can get the property for free, it can give it to the State. Amoco challenged the dedication condition as unconstitutional under the Fifth Amendment takings clause. If the State of Illinois or Cook County exercised eminent domain over the property in question, it would pay Amoco the fair market value for it. In addition, Amoco commissioned a traffic impact study which showed that its station improvements would have a negligible impact on the traffic flow. On that basis, Amoco charges that there is no relationship between the need to widen the roads and Amoco's prospective improvements, so the Village has no right to condition the zoning permit on the land dedication.

Amoco sought a preliminary injunction against the Village in this Court last September. It relied on the United States Supreme Court's ruling in *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141 (1987), to support its claim that the dedication condition amounted to an unconstitutional taking. The Village, on the other hand, characterized the case as a garden variety zoning dispute which did not belong in federal court. Denying the motion for preliminary injunction, this Court found that Amoco had a strong likelihood of prevailing on the merits but would not suffer irreparable harm because it had not lost all economic benefit of its property, it could calculate the interim lost profits, and it could be compensated with money damages.[1]

---

[1] For further discussion, see this Court's prior ruling, September 26, 1991.

The Village of Schaumburg, acting through its attorney and elected officials, reacted quickly to fend off the anticipated adverse ruling of a permanent injunction. It conducted another meeting of the Zoning Board followed by a meeting of the Board of Trustees; at these meetings various officials and citizens grappled with the problem of avoiding an adverse ruling in federal court.[2] Eventually the Board members decided to enact a repealer ordinance denying Amoco's special use permit. Using this

---

[2] Schaumburg goes to great pains to prove that this Court may not inquire into the motivations of a legislative body and that the Board minutes are not admissible evidence. It is easy to understand why it does so. Reading the transcript reminds one of an observation attributed to Bismarck to the effect that those who love law and sausages should see neither of them being made. *See Community Nutrition Institute, et al. v. Block*, 749 F.2d 50 (D.C. Cir. 1984) for a different version. At the Board meeting one dissenter to the repeal asked what relationship their decision had to zoning. Members of the majority said, in effect, it had none. The dissenter was told "We want to get this thing out of Federal Court" and "It is a tactical decision. . . . at the federal level Amoco, if we lose, Amoco has potential to win for damages. At a lower level they do not have that ability. So it's a dollar item as well." To the dissenter's request, "Give me one reason why I should approve this revocation, one legitimate reason," the response was "Because in the estimation of the village attorney, it will enhance our ability to win a lawsuit involving a zoning-related item." Moreover, Schaumburg explains the policy behind this rule as one of preserving "the kind of assistance that municipal staff people customarily give to property owners" without which the "cooperation" by "helpful staff people" with "property owners who may be seeking relief or other action from municipalities" would cease. Coming from the Village, this seems a bit disingenuous. After all, the helpful staff people of Schaumburg want to help Amoco dispose of twenty per cent of its property and the only relief the property owner in this case seeks is relief from the tactics of the defendant in denying a permit unless Amoco engages in some mutual backscratching.

more subtle ordinance along with a Village advisory plan (contained in the Woodfield Regional Concept Plan—Roselle Road Sector), the Village can indicate a way for Amoco to get its permit without bumping up against *Nollan* and the federal court system. Amoco amended its complaint to reflect the changed circumstances, alleging the first ordinance presented an unconstitutional taking and the second repealer ordinance should be invalidated and also presented an unconstitutional taking. The Village then brought a motion to dismiss this case for lack of federal jurisdiction. Amoco responded by exposing the Village meeting minutes and brought a motion for partial summary judgment on liability. At this Court's request, the parties also briefed the issue of adequate state remedies.

I.

The United States Supreme Court confronted a similar situation in *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141 (1987). In *Nollan*, a permit application for rebuilding incurred a condition that an easement across the property be granted. The Nollans wanted to tear down the existing beachfront bungalow and replace it with a three bedroom house. The California Coastal Commission required, as a condition to the permit, an easement which would link two public beaches by granting a public right of way between the Nollan's seawall and the high tide line. When the Nollans sought relief in state court, the Commission argued that their redevelopment increased private use of the shorefront and contributed to the burden on the public's shorefront use and access. In addition, the Commission argued that

it had conditioned many other coastal development permits in the area the same way.

The California appellate court reversed the trial court's writ of mandamus directing that the permit condition be struck. It found that as long as "a project contributed to the need for public access, even if the project standing alone had not created the need for access, and even if there was only an indirect relationship between the access exacted and the need to which the project contributed, imposition of an access condition on a development permit was sufficiently related to burdens created by the project to be constitutional." *Nollan*, 107 S. Ct. at 3145. As an additional reason to permit the condition, the appellate court noted that the condition diminished the property's value but did not deprive them of all reasonable use of it. The United States Supreme Court disagreed.

The Supreme Court reaffirmed its position that a permanent, physical occupation of property resulting from government action constitutes a taking, "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Id.* at 3146. While the Commission could restrict the development in order to serve a legitimate public purpose, it may not impose a condition which "utterly fails to further the end advanced as the justification for the [restriction]." *Id.* at 3148. The nexus between the need served by the restrictive condition and the imposition on the public created by the development project is essential to a finding of constitutionality. "[U]nless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but an 'out-and-out plan of extortion.' "

Id. at 3149 (citations omitted). To avoid clever gamesmanship in lieu of true compliance with this standard, the Court noted that the condition must "substantial[ly] advanc[e] . . . a legitimate state interest." *Id.* at 3150-51.

The *Nollan* analysis applies to this case. The restrictive condition in both cases would only be imposed if the owners upgraded the property, not if they left the existing structures. The government bodies articulated public needs to support the conditions. Additionally, in both cases, the conditions did not deny the owners all economically viable use of the land. Both governmental bodies imposed the same condition on the development permit applications of surrounding property owners. Like the California goal of coastal access, Schaumburg's goal of relieving traffic conditions at Golf and Roselle Roads serves a public purpose. Like the Nollans' building plans, Amoco's modernization of its service station seems unlikely to exacerbate substantially the problem addressed by the condition. If Schaumburg wants Amoco's property for a public purpose unrelated to the modernization of a service station, just as California learned in *Nollan*, it must pay for it.

Moreover, in this case, Schaumburg proposed the physical and total loss of the property, in the form of a dedication to the Village, before the redevelopment would be allowed. That is the most serious and complete taking, meriting the strictest scrutiny on review. According to the Supreme Court, when "the actual conveyance of property is [being] made a condition to the lifting of a land use restriction, [there is a] heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective." *Nollan* at 3151.

The Village of Schaumburg has submerged the fundamental issue, that is, whether it may condition a special use permit on the dedication of twenty per cent of Amoco's property, which it will stockpile, or give to the state to stockpile, in anticipation of the road widening. Under *Nollan*, the probable answer is "no." After the preliminary injunction ruling indicated that Amoco had a strong likelihood of success, the Village of Schaumburg rewrote the facts of the case by repealing the conditional permit, adopting an advisory plan with the same condition spelled out[3], and denying the permit without further explanation. Nothing has really changed; Schaumburg just put a different face on it.

Schaumburg argues that since the original ordinance is gone, the whole issue of a required dedication is moot. The issue is not gone, however; it has merely ducked under cover. Property owners like Amoco could never find relief from the Village's alleged unconstitutional design if the issue were to go unlitigated. Under that scenario, Schaumburg could wait and let the properties at the intersection of Golf and Roselle Roads stagnate until the property owners caved under the pressure to give away substantial portions of their property to the Village. There would never be an actual taking in the sense of seizing the property, that is, until the State of Illinois exercised eminent domain and paid for it. Until then, Schaumburg could simply hold up the property development, while its *advisory* policy allowed it to communicate its reasons to the property owners without forcing it to defend its actions in court.

---

[3] *See* page 65 of the Woodfield Regional Concept Plan—Roselle Road Sector.

Clearly, Schaumburg cannot tie unrelated community goals to zoning requests; it would be much like Justice Scalia's hypothetical hundred dollar dispensation for shouting "fire!" in a crowded theatre used in *Nollan*. It follows that a municipality cannot avoid the issue by cloaking an unconstitutional condition in an unexplained permit denial coupled with an unofficial, implicit condition. Of course, if Schaumburg has been misunderstood by Amoco and has truly decided not to require land dedications before permitting development on Golf and Roselle Roads anymore, it can present the evidence of another explanation for the permit denial.

Nollan and the Seventh Circuit cases, however, indicate that the State of Illinois should address this situation first. In *Williamson County Regional Planning Comm. v. Hamilton Bank*, 473 U.S. 172, 105 S. Ct. 3108 (1985), the Supreme Court held that a case is not ripe for judicial review until the governmental agency has reached a final decision. Here, Schaumburg has reached a final decision with respect to Amoco's redevelopment and special use permit request. The state action, however, is "not 'complete' in the sense of causing a constitutional injury 'unless or until the State fails to provide an adequate postdeprivation remedy for the property loss.' " *Id.* at 3121, *quoting Hudson v. Palmer*, 468 U.S. 517, 104 S. Ct. 3194, 3203, n.12 (1984). Therefore, a claimant must seek recourse through the procedures provided by the State before federal review is appropriate.

In *Estate of Himelstein v. City of Forst Wayne, Ind.*, 898 F.2d 573, 576 (7th Cir. 1990), the Seventh Circuit followed *Williamson*, holding that "a federal takings claim is not ripe until it is apparent that the state does not intend to pay compensation." In *Himelstein*, a gov-

ernment zoning council refused to issue a building permit even after the property was rezoned to allow construction of a shopping center. The Seventh Circuit held that the case was not ripe for federal review because the Himelsteins did not bring an inverse condemnation action in state court, pursuing compensation for the alleged taking.

The type of conditional permit offered to Amoco precludes an action for compensation by inverse condemnation: Amoco has an economically viable use of the land in the present service station, and the Village did not seize the land in question. Amoco appears to have two choices: leave the station as it is until the State of Illinois exercises eminent domain over the needed portion of the property and pays for it or modernize the station and give the portion to the Village of Schaumburg as a dedication. Both options would leave Amoco without an inverse condemnation suit. Either Amoco keeps its land with an economically viable use through its unimproved service station or it forgoes the right to compensation because of the nature of a dedication. Only an owner can bring an inverse condemnation suit, and the dedication would give ownership to the Village.

Amoco does have a state remedy, however, for unconstitutional denial of a permit or unconstitutional application of a zoning ordinance. In Illinois, "[t]he review of the denial of a special use permit is tested by whether the denial bears a real and substantial relation to the public health, safety, morals, or general welfare." *Reedy v. City of Wheaton*, 102 Ill. App. 3d 1082, 430 N.E.2d 273, 276, 58 Ill. Dec. 331 (2d Dist. 1981) (citations omitted). " 'If a court determines that the denial of a special use permit, including the conditions or restrictions sug-

gested by zoning procedures and record as part of such permit, does not bear a real or substantial relation to the public health, safety, morals or general welfare, judicial relief must be granted.' " *Mobil Oil Corp. v. City of Rolling Meadows*, 214 Ill. App. 3d 718, 574 N.E. 2d 41, 46, 158 Ill. Dec. 247 (1st Dist. 1991), *quoting Duggan v. County of Cook*, 60 Ill.2d 107, 116, 324 N.E.2d 406 (1975).

Mobil Oil concerns a similar fact situation to this case. Mobil wanted to modernize an existing gas station and snack shop into a self service station and minimart with a car wash. After the City denied its special use permit[4], Mobil brought a suit charging that the denial was arbitrary and unreasonable. The state court held a hearing during which Mobil presented evidence concerning the negligible effect on the traffic conditions, the commercial nature of the area, and the increased business Mobil could expect from the car wash. In addition, a city planner testified that, after reviewing "all of the minutes of the various hearings held by the planning commission and the city council," the city's zoning materials, and Mobil's building materials, he concluded that Mobil's proposed plan was the "highest and best use" of the property. Although the City offered evidence to refute Mobil's case, the court found that Mobil's proposed uses were reasonable and ordered the City to grant Mobil a special use permit. The appellate court affirmed, finding the trial court's determination "amply supported by the record." *Id.* at 47.

---

[4] Nothing in the *Mobil Oil* opinion suggests that Mobil encountered the sort or rigamarole that Amoco faced from Schaumburg.

In *Reedy*, the appellate court similarly upheld the trial court's finding that an ordinance restricting a gas station/minimart was unconstitutional as applied to the plaintiff. That case, like this one, involved traffic studies and expert testimony on the incremental increase in traffic, the increased value to the property if permitted to develop, and the highest and best use of the property.

Moreover, the Illinois Supreme Court has held, in *Pioneer Trust and Savings Bank v. Village of Mount Prospect*, 22 Ill.2d 375, 381 (1961), that a municipality cannot require a land dedication by a property owner unless the need for the land is "specifically and uniquely attributable to the [development] and which should be cast upon the [developer] as his sole financial burden." In *Pioneer Trust*, the developer, who complied with all of the conditions set out by the city except for the land dedication requirement, brought a suit to compel the approval of his plat of subdivision. The city required the dedication to provide for a new elementary school and playground.

The standard for determining the reasonableness of the condition, according to the Court, is whether the need is due to the increased activity of the development or "stems from the total activity of the community." *Pioneer Trust and Savings Bank v. Village of Mount Prospect*, 22 Ill.2d at 380, *quoting Rosen v. Village of Downers Grove*, 19 Ill.2d 448 (1960). If the burden imposed on the developer is not specifically attributable to his activity, "it is forbidden and amounts to a confiscation of private property in contravention of the constitutional prohibitions rather than a reasonable regulation . . . ." *Id.* The Illinois Supreme Court found that the issue was not the "desirability to improve the public condition, but, rather, . . . who shall pay for such improvements." *Id.* at 381. In

Pioneer Trust, neither party disputed the existing need for additional school facilities, since the current facilities were near capacity. The Court found that, since the need for an additional school resulted from the total development of the community, "the problem . . . is one which the subdivider should not be obliged to pay the total cost of remedying, and to so construe the statute would amount to an exercise of the power of eminent domain without compensation." *Id.* at 381-82.[5]

The circumstances in this case are similar to those in *Pioneer Trust*. Amoco does not dispute the eventual need to widen Golf and Roselle Roads. In fact, it willingly altered its development plans to accommodate the future road work. Amoco and Schaumburg both know of the IDOT's study in which Schaumburg participated. The dispute, then, is who should pay for the property needed to widen the roads. Under *Pioneer Trust*, the answer is Amoco *only if* Amoco's redevelopment of its property "specifically and uniquely" creates the need for the road widening. It seems clear based on the record before this

---

[5] In *Plote, Inc. v. Minnesota Alden Co.*, 96 Ill. App. 3d 1001, 422 N.E.2d 231 (1st Dist. 1981), the appellate court noted in dicta that there was a general movement toward a more liberal construction of ordinances requiring dedications. The holding in *Plote*, however, concerns the waiver of the right to challenge a dedication requirement after receiving the benefit of the permit, in contrast to Amoco's situation. In addition, the court in *Plote* was careful to reiterate that the dedication requirement must be specifically and uniquely attributable to the development and must be proportioned to the needs created by the development. *Id.* at 234-5. While a new subdivision for new homes, the situation in which some dedications are considered fair, would have a palpable impact on a community, that is not necessarily true for modernizing a service station.

Court that the traffic conditions which require the roads to be widened result from the development of the entire community. Nevertheless, Schaumburg attempted, through an ordinance conditioning Amoco's special use permit, to extract twenty per cent of Amoco's property, land the State of Illinois will in all likelihood pay Amoco for when it exercises eminent domain over the property in order to widen the adjoining roads. The repealer ordinance, as noted above, does not really retract Schaumburg's attempt to condition the permit, it merely buries the purpose under a flat denial.

In state court, Amoco will show why the area is suited to their modernization, how they have accommodated the future plans for the road widening, and why the new station and minimart will not adversely affect traffic conditions. Schaumburg has only delayed the inevitable; it still faces the difficult task of refuting Amoco's traffic analysis and showing why the special use permit should not issue. If Schaumburg tries to reconnect the dedication condition to the modernization, it will face the same lack of nexus problems discovered by this Court. The Illinois courts have already shown that they will order the issuance of special use permits which are unjustly denied. Of course, in the unlikely event that the State of Illinois refuses to order the permit to issue despite the manifest weight of the evidence showing the unreasonableness of Schaumburg's denial, Amoco has recourse in the federal courts under *Nollan*. The Motion to Dismiss is granted.

II.

Amoco's Motion for Partial Summary Judgment is mooted by the Court's ruling above, but it could not have been granted even if the motion to dismiss had been denied. Amoco has compiled an impressive record supporting the merits of its case. The evidence strongly suggests that Schaumburg is trying to burden Amoco with the cost of a community benefit, first explicitly and then implicitly. Nevertheless, Schaumburg must be afforded the opportunity to defend its denial of the special use permit *for a valid reason*. The Village should be given the opportunity to show a nexus between the negative externalities effected by Amoco's modernization of its service station and the need to widen Golf and Roselle Roads.[6] The apparent weaknesses in its case still allow room for disputed material facts.

Amoco, like the developer in *Pioneer Trust*, fulfilled each of the necessary conditions set out by the Village when Amoco first applied for the special use permit, except for the dedication condition which Amoco challenged. Schaumburg will be hard pressed to convince a trier of fact in state court that other legitimate requirements exist. The argument that Amoco's new minimart will draw so much additional traffic that it would necessitate two additional lanes on Golf and Roselle Roads is simply absurd. Even the lesser argument that the increased traffic substantially adds to the need is undercut

---

[6] The state and federal standards on permissible reasons for denying or conditionally approving the permits are virtually the same: a substantial nexus or relation between the government objective of protecting and serving the public and the denial of, or conditions attached to, the permit.

by the IDOT's longstanding plan to widen the roads, no matter what happens to the Amoco station on the corner. These arguments will be heard another day, however, in state court. The point is, the material facts are not undisputed regarding the impact the proposed modernization would have on the intersection traffic. Therefore, the case could not be resolved on summary judgment based on the current record.

The law in Illinois says that zoning decisions and special use permits are not favors to be dispensed in accord with gifts to the government. Both federal and state courts have held that it is unfair to burden one citizen with the cost of a community benefit just because he is unlucky enough to be the next in line for a zoning permit. Where states refuse to protect landowners from uncompensated takings, even those masked by legislative ordinances, the federal courts will.

Enter:

o/s James B. Zagel

James B. Zagel
United States District Judge

Date: 9 Sep 1992

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
Eastern Division

AMOCO OIL CO.,
Plaintiff

JUDGMENT IN A CIVIL CASE

v.

CASE NUMBER: 91 C 4973
Judge Zagel

VILLAGE OF SCHAUMBURG,
Defendant

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to hearing before the Court. The issued have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED, the defendant's motion to dismiss is granted. Plaintiff's motion for partial summary judgment is denied as moot.

September 9, 1992
Date

H. STUART CUNNINGHAM
Clerk

o/s Don Waler
(By) Deputy Clerk

[Dated May 6, 1996]

FMG1 67517 30308

IN THE NAME OF THE
PEOPLE OF THE STATE OF ILLINOIS
IN THE CIRCUIT COURT OF
COOK COUNTY ILLINOIS
COUNTY DEPARTMENT - LAW DIVISION

The Department of Transportation, of the State of Illinois, for and on behalf of the People of the State of Illinois,		
Plaintiff,		
v.	No.:	96 L 50324
	Job:	R-90-008-94
Amoco Oil Company, and Unknown Owners Generally,	Parcel:	OBX 0053 OBX 0053TE-A OBX 0053TE-B
Defendants.		

COMPLAINT TO CONDEMN

Now comes the DEPARTMENT OF TRANSPORTATION OF THE STATE OF ILLINOIS, Plaintiff, by JIM RYAN, Attorney General of the State of Illinois, and Mitchell Ware, Special Assistant Attorney General, and for its Complaint against the Defendant states:

1. Plaintiff, THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF ILLINOIS ("Plaintiff") is a department of the State Government of the State of Illinois as provided for and created by "the Civil Administrative Code of Illinois", 20 ILCS 5/1 et seq., Illinois

Compiled Statutes, 1993, specifically 20 ILCS 2705/49, Illinois Compiled Statutes, 1993.

2. Pursuant to Articles 2 and 4 of the Illinois Highway Code, 605 ILCS 5/2-101 to 5/220 and 5/4-101 to 5/4-511 (West 1994) (hereinafter referred to as "the Code"), the Plaintiff is engaged in the widening and resurfacing of FAP Route 557 (IL 58), a state highway under the control and jurisdiction of the plaintiff over certain lands situated in Cook County, Illinois.

3. The property required for said project is private property, and the persons named in this Complaint are the persons who own, are interested in, or otherwise claim to have some interest in that property.

4. By the terms of the Code, FAP Route 557 (IL 58) is included in the Illinois State Highway System.

5. The Illinois Highway Code provides, inter alia, as follows at 605 ILCS 5/4-501:

> "The Department, in its name, or any county may acquire the fee simple title, or such lesser interest as may be desired, to any land, rights, or other property necessary for the construction, maintenance or operation of State highways, or necessary for locating, relocating, extending, widening or straightening any State highway, or necessary for locating, relocating, extending, widening or straightening an existing street or for laying out, establishing or opening a new street within the corporate limits of any municipality which has been designated by the Department as a street to form a part of or to connect with a State highway leading up too the corporate limits of such municipality, or necessary for any other purpose or use contemplated by this Code by purchase or by the exercise of the right of eminent domain under the eminent

domain law of this State and the Department shall not be required, in any case, to furnish bond."

6. The construction and improvement of FAP Route 557 (IL 58) is a public work and is for a public use and it is necessary for the Plaintiff to acquire for the use of the People of the State of Illinois for highway purposes and lands, rights or other property hereinafter described.

7. Plaintiff, pursuant to section 4-501 of the Code referred to hereinbefore, is authorized to acquire the fee simple title, or such lesser interest as may be desired to the parcel hereinafter described.

8. Plaintiff seeks to acquire a fee simple interest and temporary easements to Parcel OBX 0053 & TE A&B, the legal descriptions of which are set forth in Exhibits "A", "B" and "C", which are attached hereto and incorporated herein by reference.

9. The lands, rights, or other property hereinafter described are private property and the persons hereinafter named in connection therewith are, so far as appears of records and so far as the Plaintiff has been able to learn, the persons who own or otherwise are interested in the same or claim to have some interest therein.

10. The compensation to be paid by the Plaintiff for this property described in Exhibits "A", "B" and "C" cannot be agreed upon between the Plaintiff and the interested parties therein although the Plaintiff has attempted to reach agreement. Therefore the Plaintiff is authorized to proceed to acquire said lands, rights or other property interest through the right of eminent domain laws of this state.

11. Plaintiff, under the provisions of the Code is authorized to acquire a fee simple interest and a temporary

easement, to the parcels described in Exhibit "A", "B" and "C". The Plaintiff, under the Code, now seeks to acquire a fee simple interest and temporary easements to Parcel OBX 0053, OBX 0053TE-A and OBX 0053TE-B, all of which are legally described in Exhibits "A", "B" and "C", which are in Cook County, Illinois.

12. The temporary easements shall be in effect for a period of three (3) years from the date of vesting or until completion of construction work to be completed as specified in the plans as prepared by the said department. The said work to be done is a good workmanlike manner and the expense there of to be assumed by the said department.

13. The owners or persons otherwise interested in the property and who are made defendants, are as follows:

Record Owners

Amoco Oil Company

Persons Otherwise Interested

Unknown Owners Generally

14. In addition to the persons named as parties defendant herein, there are or may be other persons who are interested in this cause or in the property herein before described, or some part or parts thereof, but the names of each of such other persons is unknown and on due and diligent inquiry cannot be ascertained and therefore all such other persons are made parties defendant by the name and description of "Unknown Owners Generally."

WHEREFORE, Plaintiff requests that summons be issued to the parties defendant; that just compensation be ascertained and determined according to the statute

for the fee simple and temporary easements to the Subject Property described in Attachments "A", "B" and "C" and that this Honorable Court take such other proceedings and enter such orders as are necessary, ordering that Plaintiff enter upon the subject property and use the same upon payment of full just compensation to the parties entitled therein, or to the County treasurer, within such reasonable time as is fixed by the Court; and that the Court retain jurisdiction of this cause to enter such other and further orders as may be necessary in this cause.

PLAINTIFF DEMANDS TRIAL BY JURY

o/s James E. Ryan
Attorney General cw
of the State of Illinois

o/s Jim Edgar
Governor, State of Illinois sj

THE DEPARTMENT OF TRANSPORTATION
OF THE STATE OF ILLINOIS

o/s Mitchell Ware
Mitchell Ware
Special Assistant
Attorney General
JONES, WARE & GRENARD (30308)
180 North LaSalle Street
Suite 3800
Chicago, Illinois 60601
312/263-6000

By: o/s Kirk Brown
Secretary sj

ATTACHMENT "A"

Legal Description

Parcel 0BX 0053

That part of the West 163.00 feet of the South 168.00 feet (all measured along the east line of Roselle Road and the north line of Golf Road) of that part of the Southeast 1/4 of Section 10, Township 41 North, Range 10, East of the Third Principal Meridian, which lies North of the north line of Golf Road, as dedicated under Document 10488002 and which lies East of the east line of Roselle Road, as recorded in Township dedication dated May 28, 1850 (except that part taken for widening of Roselle Road by instrument recorded March 15, 1968 as Document No. 20430983, in Cook County, Illinois, described as follows:

Commencing at the South 1/4 corner of said Section 10; thence on an assumed bearing North 00 degrees 15 minutes 26 seconds East along the west line of the Southeast 1/4 of said Section 10, a distance of 229.37; thence North 86 degrees 31 minutes 02 seconds East, 50.11 feet to said east line of said Roselle Road and the point of beginning; thence continuing North 86 degrees 31 minutes 02 seconds East 11.02 feet to a point on a line that is 11.00 feet East of and parallel to the east line said Roselle Road; thence South 00 degrees 15 minutes 26 seconds West along said parallel line, 91.07 feet; thence South 46 degrees 36 minutes 46 seconds East, 57.24 feet to a point on a line that is 35.00 feet North of and parallel with the north line of said Golf Road; thence North 86 degrees 31 minutes 02 seconds East along said parallel line, 93.08 feet; thence South 00 degrees 15 minutes 26 seconds West, 35.07 feet to a point on the north line of said Golf Road; thence South 86 degrees 31 minutes 02 seconds West along said north line Golf Road,

105.96 feet; thence North 46 degrees 36 minutes 46 seconds West, 54.69 feet to a point on the east line of said Roselle Road; thence North 00 degrees 15 minutes 26 seconds East along said parallel line, 128.00 feet to the point of beginning.

Said parcel containing 0.153 acres (6647 sq. ft.), more or less.

ATTACHMENT "B"

Legal Description

Parcel 0BX 0053TE-A

That part of the West 163.00 feet of the South 168.00 feet (all measured along the east line of Roselle Road and the north line of Golf Road) of that part of the Southeast 1/4 of Section 10, Township 41 North, Range 10, East of the Third Principal Meridian, which lies North of the north line of Golf Road, as dedicated under Document 10488002 and which lies East of the east line of Roselle Road, as recorded in Township dedication dated May 28, 1850 (except that part taken for widening of Roselle Road by instrument recorded March 15, 1968 as Document No. 20430983, in Cook County, Illinois, described as follows:

Commencing at the South 1/4 corner of said Section 10; thence on an assumed bearing North 00 degrees 15 minutes 26 seconds East along the west line of the Southeast 1/4 said Section 10, a distance of 229.37; thence North 86 degrees 31 minutes 02 seconds East along said parallel line, 61.13 feet to a point on a line that is 11.00 feet East of and parallel with the east line of said Roselle Road and the point of beginning; thence South 00 degrees 15 minutes 26 seconds West along said parallel line, 91.07 feet; thence South 46 degrees 36 minutes 46 seconds East, 6.85 feet to a point on a line that is 16.00 feet East of and parallel with the east line of said Roselle Road; thence North 00 degrees 15 minutes 26 seconds East along said parallel line, 26.43 feet; thence South 89 degrees 44 minutes 34 seconds East, 5.00 feet to a point on a line that is 21.00 feet East of parallel with the east line of said Roselle Road; thence North 00 degrees 15 minutes 26 seconds East along said parallel line, 60.00 feet; thence North 89 degrees 44 minutes 34 seconds West, 5.00 feet to aforesaid 21.00 foot parallel line; thence

North 00 degrees 15 minutes 26 seconds East along said parallel line, 9.64 feet; thence South 86 degrees 31 minutes 02 seconds West, 5.01 feet to the point of beginning.

Said parcel containing 0.018 acres (768 sq. ft.), more or less.

ATTACHMENT "C"

Legal Description

Parcel 0BX 0053TE-B

That part of the West 163.00 feet of the South 168.00 feet (all measured along the east line of Roselle Road and the north line of Golf Road) of that part of the Southeast 1/4 of Section 10, Township 41 North, Range 10, East of the Third Principal Meridian, which lies North of the north line of Golf Road, as dedicated under Document 10488002 and which lies East of the east line of Roselle Road, as recorded in Township dedication dated May 28, 1850 (except that part taken for widening of Roselle Road by instrument recorded March 15, 1968 as Document No. 20430983, in Cook County, Illinois, described as follows:

Commencing at the South 1/4 corner of said Section 10; thence on an assumed bearing North 86 degrees 30 minutes 23 seconds East along the south line of the of the Southeast 1/4 of said Section 10, a distance of 196.07; thence North 00 degrees 15 minutes 26 seconds East, 96.41 feet to a point on a line that is 35.00 feet North of and parallel with the north line of said Golf Road and the point of beginning; thence continuing North 00 degrees 15 minutes 26 seconds East, 5.01 feet; thence South 86 degrees 31 minutes 02 seconds West, 98.09 feet; thence South 46 degrees 36 minutes 46 seconds East, 6.85 feet to the aforesaid 35.00 foot parallel line; thence North 86 degrees 31 minutes 02 seconds East along said parallel line, 93.08 feet to the point of beginning.

Said parcel containing 0.011 acres (478 sq. ft.), more or less.

[Dated August 13, 1996]

FMG1 67517 30308

IN THE NAME OF THE
PEOPLE OF THE STATE OF ILLINOIS
IN THE CIRCUIT COURT OF
COOK COUNTY ILLINOIS
COUNTY DEPARTMENT - LAW DIVISION

The Department of Transportation, of the State of Illinois, for and on behalf of the People of the State of Illinois,	)	
Plaintiff,	)	
v.	)	No.: 96 L 50324
	)	Job: R-90-008-94
Amoco Oil Company, and Unkown Owners Generally,	)	Parcel: OBX 0053
	)	OBX 0053TE-A
	)	OBX 0053TE-B
Defendants.	)	

ORDER FIXING PRELIMINARY
JUST COMPENSATION

This cause coming on to be heard on motion of the Plaintiff for order pursuant to the Code of Civil Procedure, 735 ILCS 5/7-103, Illinois Compiled Statutes, 1993, for the immediate vesting of title in Plaintiff as to Parcel OBX 0053, being legally described as follows:

LEGAL DESCRIPTION

PARCEL OBX 0053

PARCEL OBX 0053 TE A&B

SEE ATTACHMENT "A", "B" AND "C" HERETO

And it further appearing that on May 6, 1996, Plaintiff filed said motion with this Court and that on said date this court ordered a hearing on said motion be set for May 14, 1996, and entered and continued the motion to August 13, 1996.

And it further appearing to the Court that plaintiff did cause said notice to be served on all parties interested;

And the Court having been advised by Counsel and having heard evidence as to the necessity for the improvements for which Parcel OBX 0053, OBX 0053TE-A and OBX 0053TE-B are being taken; the reasonableness of the amount of property being taken and the necessity of the quick taking of title to said property by the plaintiff, the Court finds:

1. That the plaintiff has the authority to exercise the right of Eminent Domain in these proceedings.

2. That the property sought to be taken, parcels OBX 0053, OBX 0053TE-A and OBX 0053TE-B are subject to the exercise of said right by the Plaintiff herein and such right is not being improperly exercised in this proceeding.

3. That reasonable necessity exists for taking the properties in the manner requested in the Motion for Immediate Vesting of Title filed herein;

And the Court having considered the amounts to be entered as just compensation for the taking of Parcel OBX 0053, and for the taking of temporary easements OBX 0053TE-A and OBX 0053TE-B attached hereto and having heard the testimony of real estate appraiser as to such compensation, considered plats and other documentary evidence, and having heard the arguments of counsel, and being fully advised in the matter;

THE COURT FIXES, as preliminary compensation that the amount constituting just preliminary compensation:

1. For the fee simple taking of Parcel OBX 0053 and for the damages to the remainder of OBX 0053, the sum of ONE HUNDRED AND FIFTY-THREE THOUSAND ($153,000.00); for the taking of temporary easements OBX 0053TE-A and OBX0053 TE-B an amount of SEVEN THOUSAND ($7,000.00), for a total amount of ONE HUNDRED AND SIXTY THOUSAND DOLLARS ($160,000.00).

Accordingly, **IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:**

1. Plaintiff within ninety (90) days from the date of this order deposit with the County Treasurer of Cook County, Illinois, ONE HUNDRED AND SIXTY THOUSAND DOLLARS ($160,000.00) as to Parcel OBX 0053 and OBX 0053TE-A and OBX 0053 TE-B for the taking.

2. That upon evidence being presented to the court that the deposits have been as provided above, the court shall enter an order vesting the fee simple title in Plaintiff as to Parcel OBX 0053 and a temporary easement to Parcels OBX 0053TE-A and OBX 0053 TE-B.

ENTER:

o/s Lester A. Bonaguro
JUDGE PRESIDING

DATED: Aug. 13, 1996

Mitchell Ware (30308)
Special Assistant Attorney General
JONES, WARE & GRENARD
180 North LaSalle Street, Suite 3800
Chicago, Illinois 60601
312/263-6000

ATTACHMENT "A"

Legal Description

Parcel 0BX 0053

That part of the West 163.00 feet of the South 168.00 feet (all measured along the east line of Roselle Road and the north line of Golf Road) of that part of the Southeast 1/4 of Section 10, Township 41 North, Range 10, East of the Third Principal Meridian, which lies North of the north line of Golf Road, as dedicated under Document 10488002 and which lies East of the east line of Roselle Road, as recorded in Township dedication dated May 28, 1850 (except that part taken for widening of Roselle Road by instrument recorded March 15, 1968 as Document No. 20430983, in Cook County, Illinois, described as follows:

Commencing at the South 1/4 corner of said Section 10; thence on an assumed bearing North 00 degrees 15 minutes 26 seconds East along the west line of the Southeast 1/4 of said Section 10, a distance of 229.37; thence North 86 degrees 31 minutes 02 seconds East, 50.11 feet to said east line of said Roselle Road and the point of beginning; thence continuing North 86 degrees 31 minutes 02 seconds East 11.02 feet to a point on a line that is 11.00 feet East of and parallel to the east line said Roselle Road; thence South 00 degrees 15 minutes 26 seconds West along said parallel line, 91.07 feet; thence South 46 degrees 36 minutes 46 seconds East, 57.24 feet to a point on a line that is 35.00 feet North of and parallel with the north line of said Golf Road; thence North 86 degrees 31 minutes 02 seconds East along said parallel line, 93.08 feet; thence South 00 degrees 15 minutes 26 seconds West, 35.07 feet to a point on the north line of said Golf Road; thence South 86 degrees 31 minutes 02 seconds West along said north line Golf Road, 105.96 feet; thence North 46 degrees 36 minutes 46 seconds West, 54.69 feet to a point on the east line of said Roselle Road; thence

North 00 degrees 15 minutes 26 seconds East along said parallel line, 128.00 feet to the point of beginning.

Said parcel containing 0.153 acres (6647 sq. ft.), more or less.

ATTACHMENT "B"

Legal Description

Parcel 0BX 0053TE-A

That part of the West 163.00 feet of the South 168.00 feet (all measured along the east line of Roselle Road and the north line of Golf Road) of that part of the Southeast 1/4 of Section 10, Township 41 North, Range 10, East of the Third Principal Meridian, which lies North of the north line of Golf Road, as dedicated under Document 10488002 and which lies East of the east line of Roselle Road, as recorded in Township dedication dated May 28, 1850 (except that part taken for widening of Roselle Road by instrument recorded March 15, 1968 as Document No. 20430983, in Cook County, Illinois, described as follows:

Commencing at the South 1/4 corner of said Section 10; thence on an assumed bearing North 00 degrees 15 minutes 26 seconds East along the west line of the Southeast 1/4 said Section 10, a distance of 229.37; thence North 86 degrees 31 minutes 02 seconds East along said parallel line, 61.13 feet to a point on a line that is 11.00 feet East of and parallel with the east line of said Roselle Road and the point of beginning; thence South 00 degrees 15 minutes 26 seconds West along said parallel line, 91.07 feet; thence South 46 degrees 36 minutes 46 seconds East, 6.85 feet to a point on a line that is 16.00 feet East of and parallel with the east line of said Roselle Road; thence North 00 degrees 15 minutes 26 seconds East along said parallel line, 26.43 feet; thence South 89 degrees 44 minutes 34 seconds East, 5.00 feet to a point on a line that is 21.00 feet East of parallel with the east line of said Roselle Road; thence North 00 degrees 15 minutes 26 seconds East along said parallel line, 60.00 feet; thence North 89 degrees 44 minutes 34 seconds West, 5.00 feet to aforesaid 21.00 foot parallel line; thence North 00 degrees 15 minutes 26 seconds East along said

parallel line, 9.64 feet; thence South 86 degrees 31 minutes 02 seconds West, 5.01 feet to the point of beginning.

Said parcel containing 0.018 acres (768 sq. ft.), more or less.

ATTACHMENT "C"

Legal Description

Parcel 0BX 0053TE-B

That part of the West 163.00 feet of the South 168.00 feet (all measured along the east line of Roselle Road and the north line of Golf Road) of that part of the Southeast 1/4 of Section 10, Township 41 North, Range 10, East of the Third Principal Meridian, which lies North of the north line of Golf Road, as dedicated under Document 10488002 and which lies East of the east line of Roselle Road, as recorded in Township dedication dated May 28, 1850 (except that part taken for widening of Roselle Road by instrument recorded March 15, 1968 as Document No. 20430983, in Cook County, Illinois, described as follows:

Commencing at the South 1/4 corner of said Section 10; thence on an assumed bearing North 86 degrees 30 minutes 23 seconds East along the south line of the of the Southeast 1/4 of said Section 10, a distance of 196.07; thence North 00 degrees 15 minutes 26 seconds East, 96.41 feet to a point on a line that is 35.00 feet North of and parallel with the north line of said Golf Road and the point of beginning; thence continuing North 00 degrees 15 minutes 26 seconds East, 5.01 feet; thence South 86 degrees 31 minutes 02 seconds West, 98.09 feet; thence South 46 degrees 36 minutes 46 seconds East, 6.85 feet to the aforesaid 35.00 foot parallel line; thence North 86 degrees 31 minutes 02 seconds East along said parallel line, 93.08 feet to the point of beginning.

Said parcel containing 0.011 acres (478 sq. ft.), more or less.

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

AMOCO OIL COMPANY,	)	
	)	
Plaintiff-Appellant, Cross-Appellee,	)	
	)	
v.	)	No. 1-94-3648
	)	
VILLAGE OF SCHAUMBURG,	)	
	)	
Defendant-Appellee, Cross-Appellant.	)	

ORDER

Upon consideration of petition for rehearing filed by defendant-appellee, cross-appellant,

IT IS HEREBY ORDERED that said petition for rehearing is DENIED.

o/s Jill K. McNulty
Justice McNulty

o/s William Cousins
Justice Cousins

Order entered
Feb. 20, 1996

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
80743 SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

June 5, 1996

Mr. Jack M. Siegel
Altheimer & Gray
10 S. Wacker Dr., S#4000
Chicago, IL 60606

No. 80743 – Amoco Oil Company, etc., respondent, v. Village of Schaumburg, etc., petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on June 27, 1996.

FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Amendment [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment [XIV.]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United

States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative of Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

65 ILCS 5/11-13-1.1
ZONING ENABLING ACT
providing for special uses

5/11-13-1.1. Special uses

§ 11-13-1.1. The corporate authorities of any municipality may in its ordinances passed under the authority of this Division 13 provide for the classification of special uses. Such uses may include but are not limited to public and quasi-public uses affected with the public interest, uses which may have a unique, special or unusual impact upon the use or enjoyment of neighboring property, and planned developments. A use may be a permitted use in one or more zoning districts, and a special use in one or more other zoning districts. A special use shall be permitted only after a public hearing before some commission or committee designated by the corporate authorities, with prior notice thereof given in the manner as provided in Section 11-13-6 and 11-13-7. A special use shall be permitted only upon evidence that such use meets standards established for such classification in the ordinances, and the granting of permission therefor may be subject to conditions reasonably necessary to meet such standards. In addition, any proposed special use which fails to receive the approval of the commission or committee designated by the corporate authorities to hold the public hearing shall not be approved by the corporate authorities except by a favorable majority vote of all aldermen, commissioners or trustees of the municipality then holding office; however, the corporate authorities may by ordinance increase the vote requirement to two-thirds of all aldermen, commissioners or trustees of the municipality then holding office.

Laws 1961, p. 574, § 11-13-1.1, added by Laws 1967, p. 3501, § 1, eff. Sept. 1, 1967. Amended by P.A. 76-580, § 1, eff. July 31, 1969; P.A. 86-330, § 2, eff. Aug. 30, 1989.

Formerly Ill.Rev.Stat. 1991, ch. 24, ¶ 11-13-1.1.

E. All refuse disposal areas and grease storage containers shall be screened on a minimum of three (3) sides by a solid commercial-grade wood fence, wall or equivalent material to a height of not less than six (6) feet and no greater than seven (7) feet in height. The enclosure shall be used strictly for the confinement of refuse and grease containers and shall not be used for the outside storage of any other materials or equipment. The open side of said enclosure shall be situated such that, to the greatest extent possible, it does not face toward an abutting property or street in accordance with the provisions of Article IX, Section 2.9.

F. Exterior decorative neon lighting of any kind shall not be permitted within the zoning district.

2.5-7 Off-Street Parking and Loading.

A. All service drives to the rear of a building shall be a minimum twenty-four (24) feet in width exclusive of all dumpster enclosures, loading areas, and any other accessory uses or structures.

B. Parallel parking spaces shall be prohibited.

C. Parking to the rear of any building shall be minimized.

D. All uses shall conform to the applicable requirements for off-street parking and loading as set forth in Article VIII.

2.5-8 Tree Preservation, Landscaping, and Screening. All uses shall conform to the applicable requirements for tree preservation, landscaping, and screening set forth in Article V, Section 5, and in Article VIII, Section 8.

2.5-9 Performance Standards. All uses shall conform to the Performance Standards for noise, vibration, smoke, dust, odor, heat, glare, fire hazard and other objectionable influences established by the Illinois Protection Act and administered by the Illinois Environmental Protection Agency (IEPA).

2.5-10 Sewer and Water. All uses shall be serviced by a municipal sewer and water system as set forth in the Village of Schaumburg Subdivision Control Ordinance.

2.5-11 Signs. All uses shall conform to the applicable requirements for signs set forth in the Village of Schaumburg Sign Ordinance.

SECTION 3 - B-2 GENERAL BUSINESS DISTRICT

3.1 Description of District. The B-2 General Business District is the primary commercial retail and service zoning district of the community. This District is an intensive classification in which the commingling of many retail, service, and office uses is permitted. Structures located in this _____ from freestanding buildings to community and regional shopping centers _____ centers which minimize access cuts and signage while maximizing _____ the preferred type of development in

this Zoning District. In most instances _____ District is located along or at the convergence of primary arterial thorough_____.

3.2 Permitted Uses. Permitted uses of structures and land as hereinafter enumerated shall be allowed in the B-2 General Business District only in accordance with the conditions specified. Only those uses specifically listed hereunder shall be considered permitted uses, and no structure or land shall be devoted to any use other than a use permitted hereunder with the exception of:

A. Uses lawfully established prior to the effective date of this Ordinance;

B. Special Uses in compliance with the provisions of Section 3.3; or,

C. Accessory Uses in compliance with the provisions of Article V.

The following uses constitute the only permitted uses in the B-2 Zoning District:

3.2-1 Retail Business Uses

A. Air Conditioning Sales and Service
B. Antique Shops
C. Apparel and Accessory Stores
D. Appliance Sales and Service
E. Art Galleries
F. Art Supply Stores
G. Automobile Parts and Supply Stores
H. Bait Shops
I. Bakeries: Retail
J. Bicycle Sales and Repair Shops
K. Book Stores
L. Building Materials and Supply Stores
M. Business Machine Sales and Service
N. Camera and Photographic Supply Stores
O. Candy and Confectionery Stores

P. Carpet and Rug Stores
Q. China and Glassware Stores
R. Cigar, Cigarette, and Tobacco Stores
S. Clothing and Apparel Stores
T. Coin, Philatelic, Stamp, and Numismatic Stores
U. Computer Sales and Service
V. Convenience Stores
W. Dairy Product Sales
X. Delicatessens
Y. Department Stores
Z. Drapery Stores
AA. Drug Stores
BB. Dry Goods Stores
CC. Electrical Supply and Equipment Stores
DD. Electronic Sales and Service
EE. Eyewear Sales and Service
FF. Fabric and Sewing Supply Stores
GG. Fish Markets
HH. Floor Covering Stores
II. Florists
JJ. Food Stores
KK. Frozen Food Stores
LL. Fruit and Vegetable Markets; Retail
MM. Furniture and Home Furnishing Stores
NN. Furriers and Fur Apparel Stores
OO. Garden Supply Stores
PP. Gift and Novelty Stores
QQ. Grocery Stores
RR. Haberdasheries
SS. Hardware Stores
TT. Hobby Stores
UU. Home Decorating Stores
VV. Home Supply Centers
WW. Hosiery Stores
XX. Ice or Ice Machine Sales
YY. Interior Decorating Shops
ZZ. Jewelry Store
AAA. Lawnmower Sales and Service

BBB. Leather Goods and Luggage Stores
CCC. Linoleum and Tile Stores
DDD. Liquor Stores
EEE. Magazine and Newspaper Stores
FFF. Meat Markets
GGG. Medical Appliance Stores
HHH. Millinery Shops
III. Motor Vehicle Parts and Supply Stores
JJJ. Musical Instrument Sales and Service
KKK. Newsstands
LLL. Notions Stores
MMM. Nurseries and Garden Stores: Retail
NNN. Office Equipment and Supply Stores
OOO. Paint, Glass, and Wallpaper Stores
PPP. Pet Stores
QQQ. Phonograph, Records, Tape, and Music Stores
RRR. Plumbing Appliance and Equipment Stores
SSS. Radio Sales and Service
TTT. Sewing Machine Sales and Service
UUU. School Supply Stores
VVV. Shoe Stores
WWW. Souvenir and Curio Stores
XXX. Sporting Goods Stores
YYY. Stationery and Card Stores
ZZZ. Tailors
AAAA. Telephone Sales and Service
BBBB. Tele____ Sales and Service
CCCC. Toy Stores
DDDD. Tool Sales and Service
EEEE. Water Softener Sales and Service

3.2-2 Service Uses

A. Art Studios
B. Banks
C. Barber Shops
D. Beauty Parlors and Shops
E. Blueprinting, Photostating, and Small Duplicating Establishments

F. Catering Establishments
G. Cleaners: Retail
H. Clothing and Costume Rental Agencies
I. Credit Unions
J. Currency Exchanges
K. Dry Cleaners: Retail
L. Employment Agencies
M. Financial Institutions
N. Funeral Homes and Parlors
O. Fur Repairs
P. Furniture Cleaning, Upholstery, and Repair Shops
Q. Garages: Private Customer and Employee
R. Garages: Public
S. Glass Cutting and Glazing
T. Jewelry Repair
U. Laundries and Laundromats: Retail
V. Loan Companies
W. Locksmiths
X. Music Conservatories and Studios
Y. Photographic Processing Shops: Retail
Z. Photographic Studios: Retail
AA. Picture Framing Shops
BB. Savings and Loan Associations
CC. Shoe and Hat Repair Shops
DD. Tailors and Dressmaking Shops
EE. Taxidermy Shops
FF. Telegraph Offices
GG. Ticket Agencies
HH. Travel Agencies

3.2-3 Office and Professional Uses

A. Employment Agencies
B. Offices, except as noted elsewhere in this Ordinance
C. Political Organization Offices
D. Real Estate Sales and Brokerage Offices

3.2-4 Health, Medical, and Care Facilities

A. Drug Stores
B. Electrolysis and Hair Removal Offices
C. Health Treatment Centers
D. Medical Appliance and Supply Stores
E. Medical Laboratories
F. Medical Offices

3.2-5 Public and Utility Uses

A. Fire Stations
B. Garages and Parking Lots: Public
C. Government Offices
D. Police Stations
E. Post Offices
F. Telephone Exchange, Switching, and Transmitting Facilities

3.2-6 Cultural, Recreational, and Entertainment Uses

A. Athletic Fields
B. Billiard and Pool Halls
C. Botanical Gardens
D. Bowling Alleys
E. Clubs, Lodges and Fraternal Organizations
F. Dance Studios
G. Golf Courses
H. Gymnasiums: School and Park
I. Health Clubs
J. Ice Skating Rinks: Indoor
K. Motion Picture and Drama Theatres
L. Museums
M. Nature Preserves and Sanctuaries
N. Playgrounds
O. Roller Skating Rinks
P. Swimming Clubs and Pools
Q. Tennis, Racquetball, Handball, and Other Private Recreational Clubs

3.2-7 Educational Uses

A. Barber and Beauty Schools
B. Business and Technical Schools
C. Dance and Music _____ and Conservatories
D. Personnel Training Centers
E. Studios for Art, Ceramics and Similar Skills
F. Studios for Drama, Speech, and Similar Skills
G. Trade School

3.2-8 Religious Uses

A. Religious Reading Rooms

3.2-9 Similar and Compatible Uses. Other uses which are similar and compatible to those allowed in the B-2 Zoning District. Determination of what constitutes similar and compatible shall be made by the Director of Planning, or his authorized designee, acting in the capacity of Zoning Administrator.

3.3 Special Uses. Special Uses of structures and land as hereinafter enumerated shall be allowed in the B-2 General Business District only in accordance with the provisions of Article VII. The following uses constitute the only Special Uses allowed in the B-2 Zoning District.

3.3-1 Retail Uses

A. Agricultural Implement Sales and Service
B. Aircraft Sales and Service
C. Automobile Mini-Markets
D. Boat Sales and Service
E. Farm Supply Stores
F. Feed and Grain Stores

G. Marine Craft and Accessories Sales and Service
H. Monument and Tombstone Sales
I. Motor Vehicle Sales and Service
J. Outdoor Nurseries and Garden Centers, accessory to a permitted or Special Use
K. Pawn Shops
L. Swimming Pool Sales and Service

3.3-2 Service Uses

A. Ambulance Services
B. Animal Hospital and Veterinary Clinics
C. Animal Pounds
D. Animal Shelters
E. Auction Houses
F. Automobile Driving Schools
G. Automobile Leasing Agencies
H. Automobile Repair and Service
I. Automobile Service Stations
J. Banquet Halls
K. Care Wash Installations
L. Equipment Rental and Leasing
M. Hotels
N. Ice Cream Shops
O. Kennels
P. Motels
Q. Motor Vehicle Leasing
R. Motor Vehicle Rental Agencies
S. Motor Vehicle Repair and Service
T. Parcel Pick-Up and Delivery Services
U. Restaurants

3.3-3 Health, Medical, and Care Facilities

A. Alcoholic, Psychiatric, and Narcotic Treatment Facilities
B. Day Care Centers
C. Hospitals
D. Nursery School

3.3-4 Public and Utility Uses

A. Electric Substations
B. Public Works Garages
C.
D.
E.
F.
G. _____ Substations
H. Water Towers
I. Water Treatment and Distribution Facilities
J. Water Wells, Reservoirs, and Storage Facilities

3.3-5 Cultural, Recreational, and Entertainment Uses

A. Amusement Establishments, except as noted elsewhere in this Ordinance
B. Auditoriums
C. Community and Recreational Centers
D. Country Clubs
E. Cultural and Entertainment Centers
F. Libraries
G. Miniature Golf Courses
H. Stables and Riding Academies

3.3-6 Educational Uses

A. Colleges and Universities
B. Dormitories, Housing Accommodations, and Associated Facilities, when associated with an Educational Institution
C. Vocational Schools

3.3-7 Religious Uses

A. Chapels
B. Churches
C. Parsonages
D. Rectories

E. Religious Assembly Halls and Meeting Rooms
F. Synagogues
G. Temples

3.3-8 Miscellaneous Uses

A. Concrete Batch Plants: Temporary
B. Hazardous Material and Waste
C. Roadside Farm Stands: Temporary

3.3-9 Similar and Compatible Uses. Other uses which are similar and compatible to those allowed as Special Uses in the B-2 Zoning District. Determination of what constitutes similar and compatible shall be made by the Director of Planning, or his authorized designee, acting in the capacity of Zoning Administrator.

3.4 Site and Structure Provision. Uses of structures and land in the B-2 General Business District shall conform to the following site and structure provisions:

3.4-1 Minimum Area

A. District. The area that may constitute a separate or detached part of the B-2 Zoning District shall not be less than four (4) acres. However, land zoned in the B-3, B-4, and Manufacturing Zoning Districts which immediately abuts land in the B-2 District may be included in the calculations in meeting the minimum District area.

B. Lot. The lot area of each zoning lot shall not be less than twenty thousand (20,000) square feet.

3.4-2 Minimum Lot Width. The lot width of each zoning lot shall not be less than one hundred (100) feet.

3.4-3 Maximum Lot Coverage. The maximum lot coverage of all principal and accessory buildings located on a zoning lot shall not exceed thirty (30) percent of the total area of the lot.

3.4-4 Maximum Floor Area Ratio (FAR). The maximum floor area ratio of all principal and accessory buildings, including parking structures, located on a zoning lot shall not exceed forty (40) percent of the total area of the lot.

3.4-5 Maximum Building Height. No principal or accessory building located on a zoning lot shall exceed thirty-five (35) feet in height.

3.4-6 Minimum Yard Requirements. The following minimum yards shall be provided and maintained:

A. Front and Corner Side Yards

1. Buildings. All buildings, including parking structures, shall be set back from a front lot line or corner side lot line abutting either a roadway right-of-way or private street a minimum of twenty-eight (28) feet plus one (1) additional foot back for every one (1) foot increase in building height over twenty-eight (28) feet in height. All buildings, including parking structures shall be set back from a front lot line or corner side lot line abutting a private street a minimum of twenty-eight (28) feet.

2. Parking. All off-street parking and loading areas shall be set back from a front lot line or corner side lot line abutting either a roadway right-of-way or private street a minimum of ten (10) feet.

B. Interior Side Yards

1. Buildings. An interior side yard is not required for buildings. However, where an interior side lot line abuts a Residential Zoning District, all buildings shall be set back a minimum of fifteen (15) feet from the abutting interior lot line, plus one (1) additional foot back for every one (1) foot in building height over twenty-eight (28) feet.

2. Parking. All off-street parking and loading areas shall be set back from each interior side lot line a minimum of five (5) feet. However, where an interior side lot line abuts a Residential Zoning District, all off-street parking and loading areas shall be set back a minimum of ten (10) feet from the abutting interior lot line.

C. Rear Yard

1. Buildings. All buildings shall be set back from the rear lot line a minimum of fifteen (15) feet. However, where a rear lot line abuts a Residential Zoning District, all buildings shall be set back a minimum of thirty (30) feet from the rear lot line.

2. Parking. All off-street parking and loading areas shall be set back from the rear lot line a minimum of five (5) feet. However, where a rear lot line abuts a Residential Zoning District, all off-street parking and loading areas shall be set back a minimum of ten (10) feet from the rear lot line.

3.5 District Standards. All uses of structures and land in the B-2 General Business District are subject to the general standards and regulations of this Ordinance. In addition, all uses located in the B-2 Zoning District shall be subject to the following District standards:

3.5-1 Site Plan Review. To insure compliance with the applicable provisions of this Ordinance, any exterior construction, change in use, or increase in the intensity of an existing use, including variations and Special Uses, but excluding normal maintenance activity, in the B-2 District shall require Site Plan Review prior to the issuance of a building permit. This process shall insure that new development proposals are in full compliance with all applicable Village codes, ordinances, standards and policies. Development proposals which are located within existing buildings or result in the redevelopment of existing properties shall comply with those Village requirements and policies determined appropriate by the Village Board of Trustees.

3.5-2 Retail or Service Uses Only. All business establishments shall be retail or service in use and deal directly with consumers, except for those wholesale establishments allowed herein. All goods produced on the premises

shall be sold as retail goods on the premises where produced.

3.5-3 Operation Within An Enclosed Structure. All business, service, storage, and display of goods shall be conducted within completely enclosed structures, except:

A. Automobile Service Station, when allowed as a Special Use in accordance with the provisions of Article VII, Section 9;

B. Off-Street Parking and Loading;

C. Outdoor Seating Areas Accessory to Restaurants, when allowed as a Special Use in accordance with the provisions of Article VII, Section 10;

D. Sale or Display of Merchandise Sold or Offered for Sale through Vending Machines, provided such machines do not occupy an aggregate ground area of more than sixteen (16) square feet; or,

E. Accessory Uses, when allowed in accordance with the provisions of Article V, Section 4.

F. Motor Vehicle Display and Storage used in conjunction with Motor Vehicle Sales, Rental, and/or Leasing Agencies, when allowed in accordance with the provisions of Article V, Section 9.

3.5-4 Standards for Property Abutting Residential Property

A. Solid screening to a minimum of six (6) feet in height and a design satisfactory to the Planning Department shall be provided along the length of the abut-

ting property line to the building setback line of the abutting residential property. Such screening shall consist of a continuous landscaped berm, solid wood fence, wall or other comparable material. All fencing shall be constructed of commercial grade wood or comparable material approved by the Planning Department. The finished side of the fence or wall shall be oriented toward the abutting property zoned for residential use. If determined necessary by the Planning Department, due to topographical changes between the abutting commercial and residential property, the minimum height of the required screening may be increased to eight (8) feet. Continuous landscaping, a minimum of three (3) feet in height and in a design satisfactory to the Planning Department, shall be provided along that portion of the abutting property line from the building setback line to the front lot line of the abutting residential property. Such landscaping shall consist of berms, if feasible, trees, evergreens, shrubbery, hedges and/or other live planting materials.

B. All exterior lighting shall be shaded or inwardly directed in such a manner so that no direct lighting or glare is cast upon adjacent residential or institutional property. The intensity of such lighting shall not exceed on (1.0) foot candle as measured at the abutting property line. All lighting not used for building illumination, safety purposes, or other-

wise required by the Village of Schaumburg shall be operated only between the hours of 7:00 a.m. and 11:00 p.m.

C. The parking and/or storage of trucks overnight as an accessory use when used in the conduct of a permitted or Special Use shall be limited to vehicles of not over one and one-half (1.5) tons capacity when located within one hundred fifty (150) feet of a residential district. Trucks shall be restricted from using residential streets by means of signage and site plan design to discourage such movements.

D. Access drives shall be located, to the fullest extent possible, a maximum distance from the residential property line.

E. All twenty-four (24) hours operations shall be located, to the fullest extent possible, a maximum distance from the common property line.

F. All restaurants shall be required to install a charcoal or equivalent filtering system for additional filtering of objectionable odors.

3.5-5 Design Standards.

A. Any structure over two-hundred (200) feet in length shall be designed so as to stagger the front facades (and rear facades when adjoining residential property) to break up the visual expanse of the structure.

B. All roof-top mechanical equipment shall be completely screened from public view by a continuous, permanent and

sound absorbent screen of the same color as the principal structure. Wherever possible, the screen should be designed as an architectural component of the structure in the form of a parapet wall.

C. All buildings shall be constructed of face brick or comparable material, as approved by the Planning Department, on all sides, including the rear.

D. All gas and electric meters, downspouts, and other appurtenances shall either be incorporated internally into the structure or be of the same color as the principal structure.

E. All refuse disposal areas and grease storage containers shall be screened on a minimum of three (3) sides by a solid commercial-grade wood fence, wall, or equivalent materials to a height of not less than six (6) feet and no greater than seven (7) feet in height. The enclosure shall be used strictly for the confinement of refuse and grease containers and shall not be used for the outside storage of any other materials or equipment. The open side of said enclosure shall be situated such that, to the greatest extent possible, it does not face toward an abutting property or street in accordance with the provisions of Article IX, Section 2.9.

F. The use of decorative exterior neon on buildings shall be integral to the architectural design of the building and have a logical and complementary relation-

ship to the building elevation. Neon should not be applied solely to attract the attention of the passing motorists. Use of exterior decorative neon shall be permitted for the following permitted uses: all retail business uses, all service uses (excluding banks, credit unions, financial institutions, funeral homes and parlors, loan companies, and savings and loan associations), drug stores, all cultural, recreational, and entertainment uses, and any other uses deemed appropriate by the Director of Planning or his/her authorized representative. Use of exterior decorative neon for Special Uses shall be reviewed as part of the Special Use approval process or as an amendment to the approval thereafter. Neon shall not be placed on any building elevation which faces a residential use. The use of exterior neon for tenants in any multi-tenant complex shall only be permitted when part _____ uniform program _____ be implemented by all tenants or where the facade of the tenants has an architectural appearance different from the other tenants.

3.5-6 Off-Street Parking and Loading.

A. All service drives to the rear of a building shall be a minimum twenty-four (24) feet in width exclusive of all dumpster enclosures, loading areas, and any other accessory uses or structures.

B. Parallel parking spaces shall be prohibited.

C. Parking to the rear of any building shall be minimized.

D. All uses shall conform to the applicable requirements for off-street parking and loading as set forth in Article VIII.

3.5-7 Tree Preservation, Landscaping, and Screening. All uses shall conform to the applicable requirements for tree preservation, landscaping, and screening set forth in Article V, Section 5, and in Article VIII, Section 8.

3.5-8 Performance Standards. All uses shall conform to the Performance Standards for noise, vibration, smoke, dust, odor, heat, glare, fire hazard and other objectionable influences established by the Illinois Protection Act and administered by the Illinois Environmental Protection Agency (IEPA).

3.5-9 Sewer and Water. All uses shall be served by a municipal sewer and water system as set forth in the Village of Schaumburg Subdivision Control Ordinance.

3.5-10 Signs. All uses shall conform to the applicable requirements for signs set forth in the Village of Schaumburg Sign Ordinance.

SECTION 4 – B-3 PLANNED OFFICE BUSINESS DISTRICT

4.1 Description of District. The B-3 Planned Office Business District is intended to provide an environment suitable for and limited to large office uses, research and development activities, and ancillary commercial functions. Development in this District is limited to parcels of land accessible to major arterial thoroughfares where architecturally coordinated structures can be integrated into a park-like

atmosphere. The type of development allowed in the B-3 District includes corporate headquarters, large research and development facilities, and office parks of substantial size. Due to the specialized nature of the B-3 District, most retail and service uses, excluding those devoted purely to office and research activities, are prohibited. Because of the magnitude of those uses typically locating in the District and their impact on the surrounding environment, prior to the commencement of construction activity, the Zoning Board of Appeals shall review and the Village Board of Trustees shall approve a Preliminary Development Plan for all areas located in the B-3 Planned Office Business District.

4.2 Permitted Uses. Permitted uses of structures and land as hereinafter enumerated shall be allowed in the B-3 Planned Office Business District only in accordance with the conditions specified. Only those uses specifically listed hereunder shall be considered permitted uses, and no structure or land shall be devoted to any use other than a use permitted hereunder with the exception of:

A. Uses lawfully established prior to the effective date of this Ordinance;

B. Special Uses in compliance with the provisions of Section 4.3; or,

C. Accessory uses in compliance with the provisions of Article V.

ARTICLE VII - SPECIAL USES

SECTION 1 - PURPOSE

The principal objective of this Zoning Ordinance is to provide for an orderly arrangement of compatible building and land uses and for the proper location of all types of uses required for the social and economic welfare of the Village. To accomplish this objective, each type and kind of use is classified as permitted in one (1) or more of the various districts established by this Ordinance. However, in addition to those uses specifically classified and permitted in each district, there are certain additional uses which it may be necessary to allow because of their unusual characteristics or the service they provide to the public. These Special Uses require particular consideration as to their proper location in relation to adjacent established or intended uses, or to the planned development of the community. The conditions controlling the location and operation of such Special Uses are established by the following provisions of this Article.

SECTION 2 - AUTHORITY

The Village Board of Trustees of the Village of Schaumburg shall have authority to permit the Special Uses of land or structures listed in each zoning district, subject to the provisions of Section 4 of this Article, if it finds that the proposed location and establishment of any such use will be desirable or necessary to the public convenience or welfare and will be harmonious and compatible with other uses adjacent to and in the vicinity of the selected site or sites.

SECTION 3 - CONDITIONS AND APPROVAL

The Zoning Board of Appeals may recommend and the Village Board of Trustees may impose such restrictions

upon the height and bulk and area of occupancy of any structure so approved for "Special Use" as may be reasonable under the particular circumstances, provided that such restrictions and stipulations shall not be more restricted than the requirements established for the district in which such structure is proposed to be located, or as may be required in any municipal ordinance. Off-street parking facilities as well as off-street loading and unloading spaces may also be stipulated in the ordinance permitting the "Special Use".

SECTION 4 - PROCEDURE

The procedure to be followed in considering applications of "Special Uses" shall be as follows:

4.1 Application. An application verified by the owner of record or authorized agent of said owner of the property involved shall be filed with the Planning Department for the attention of the Zoning Board of Appeals upon a form prescribed therefor, which shall contain, or be accompanied by, all required information.

4.2 Public Hearings. Upon receipt of such verified application, the Village shall give notice of a public hearing in the same manner as provided for hearings on the reclassification of property, as contained in Article XIV. A record of pertinent information presented at the public hearing shall be made and maintained by the Zoning Board of Appeals as part of their permanent record relative to the applicant.

4.3 Determination. The Zoning Board of Appeals shall then make its findings and recommendations to the Village Board of Trustees within thirty (30) days following the date of public hearing for each application. The Board of Trustees may then authorize a "Special Use" as defined herein by specific ordi-

nance, provided the evidence presented is such as to establish beyond a reasonable doubt:

4.3-1 That the proposed use at that particular location requested is necessary or desirable to provide a service or a facility which is in the interest of public convenience and will contribute to the general welfare of the neighborhood or community, and;

4.3-2 That such use will not, under the circumstances or the particular case, be detrimental to the health, safety, morals or general welfare of persons residing or working in the vicinity or injurious to property values or improvements in the vicinity, and;

4.3-3 That the proposed use will comply with the regulations and conditions specified in this Ordinance for such use and with the stipulations and conditions made a part of the authorization granted by the Board of Trustees.

4.4 Termination of Special Use: The Village Board of Trustees may without need of further hearing terminate and void the Special Use after which the use must conform to the use regulations of the district in which it is located if:

4.4-1 Construction has not commenced within two (2) years of the Special Use ordinance or completed within three (3) years of the date of approval of the applicable Special Use ordinance or from the effective date of this amendment (3/24/81), whichever is later. For purposes of this Section, construction shall mean building of public or private improvements to the land in accordance with final plans approved by the Village.

4.4-2 The building structure or portion thereof, for which a Special Use has been granted, becomes vacant and remains unoccupied or is occupied for a use other than granted by the Special Use for a continuous period of one (1) year from the date of approval of the applicable Special Use ordinance or from the effective date of this amendment (3/24/81).

SECTION 9 - AUTOMOBILE SERVICE STATION

Automobile service stations are commercial enterprises unique and different from other Special Uses and, as such, require the imposition of certain specific regulations intended to promote the public health, safety, comfort, morals and convenience by ensuring that such uses are compatible with their surroundings and only minimally impact the roadway network.

9.1 Uses Permitted. All automobile service stations shall be classified into one (1) of the following categories:

9.1-1 Type A. An automobile service station which in addition to the retail dispensing of vehicular fuels offers to perform, as an accessory use, automotive maintenance, service or repairs including but not limited to the sale and installation of lubricants, tires, batteries and similar accessories for automotive vehicles by owner representatives. May also allow as an option customer dispensing of motor fuels at certain pump islands.

9.1-2 Type B. An automobile service station in which the dispensing of vehicular fuel is performed primarily by the individual patrons and which does not offer to perform any

manner of automotive maintenance, service or repair.

9.1-3 Type C. A Type A or B automobile service station which offers or includes, as an accessory use, the retail sale of merchandise or services not related to the maintenance, service or repair of automotive vehicles.

9.2 Uses Not Allowed. The following uses shall not be performed in conjunction with any automobile service station:

A. The outdoor repair, service or maintenance of automobiles.

B. Painting and body work of automobiles.

C. The storage of wrecked or abandoned vehicles.

D. Automobile sales.

E. Bulk plants.

9.3 Hours of Operation. Effective 07/26/88, the hours of operation of all automobile service stations located within one hundred fifty (150) feet of a residential area shall be restricted to 6:00 a.m. through 10:00 p.m. daily. Existing automobile service stations whose hours of operation currently extend beyond this period shall be exempt from this provision.

9.4 Minimum Services Required. All automobile service stations regardless of category type shall, at a minimum, offer public restroom facilities and water and air for automotive vehicles for use by the general public.

9.5 Design Criteria

9.5-1 Canopies and Pump Islands. Canopies _____ con___ to the minimum building setback. Pump island shall have the minimum setback of ten (10) feet.

9.5-2 Exterior Lighting. All exterior lighting shall be inwardly directed so that no direct lighting is cast off premises.

9.5-3 Parking and Landscaping. Parking and landscaping requirements shall conform to the regulations set forth in Article VIII of this ordinance. Additional parking may be required as determined necessary by the Zoning Board of Appeals.

9.5-4 Access to Public Roadways. The number of access cuts shall be minimized so as to encourage the most optimum traffic movement and circulation pattern onto public roadways.

9.5-5 Access with Adjoining Sites. Automobile service stations located in existing or proposed shopping centers shall provide access interconnection with the shopping center.

9.6 Orientation Toward Shopping Centers. Automobile service stations located in an existing or proposed shopping center are encouraged to orientate the service station towards the shopping center and not the adjoining streets. For purposes of this Section, oriented towards shall mean the direction in which the pump islands and main building face. In such event, the following design criteria would be applied:

A. Setback. The minimum setback along publicly dedicated streets shall not be less than fifteen (15) feet.

B. Pump Islands and Canopies. The minimum setback of pump islands and canopies shall be fifteen (15) feet from any property ___.

C. Landscaping. A fifteen (15) foot landscape area shall be provided between the building setback

and public right-of-way. The area shall consist of a three (3) foot high barrier, using berms if feasible and shrubs or trees (with a minimum diameter of two and one-half (2.5) inches) distributed along fifty (50) percent of the entire frontage. A ten (10) foot curbed and landscaped area shall be provided around the remainder of the site. The ten (10) foot area shall consist of at least fifty (50) percent live landscaping in the form of trees at twenty (20) foot intervals and intermittent shrub clusters.

SECTION 10 - RESTAURANTS

Restaurants are commercial enterprises unique and different from other Special Uses and, as such, require the imposition of certain specific regulations _____ to promote the public health, safety,

ORDINANCE NO. 91-78 07/09/91

AMOCO SERVICE STATION - 10 E. GOLF ROAD
CASE NO. Z9010-12

AN ORDINANCE GRANTING SPECIAL USE FOR A TYPE "C" AUTOMOBILE SERVICE STATION, FRONT YARD SETBACK VARIATION AND SITE PLAN APPROVAL

WHEREAS, the Zoning Board of Appeals of the Village of Schaumburg conducted public hearings on January 16 and February 20, 1991 to consider a request for a Special Use for a Type "C" automobile service station, front yard setback variation and Site Plan Approval for a 1,560 square foot (GFA) Amoco Service Station located at 10 E. Golf Road (northeast corner of Roselle Road and Golf Road), Case No. Z9010-12; and

WHEREAS, The Zoning Board of Appeals has recommended the granting of said Special Use, front yard setback variation and Site Plan Approval, subject to certain conditions; and

WHEREAS, the President and Board of Trustees of the Village of Schaumburg have determined that the strict application of the Zoning Ordinance to said premises will result in practical difficulty and particular hardship to the owner, and that granting of said front yard setback variation will not alter the essential character of the locality; and

WHEREAS, the President and Board of Trustees of the Village of Schaumburg have determined that the application for Special Use is in full conformance with the regu-

lations and requirements of the Zoning Ordinance, and that granting of said Special Use is in the best interest of the Village of Schaumburg;

NOW, THEREFORE, BE IT ORDAINED BY THE PRESIDENT AND BOARD OF TRUSTEES OF THE VILLAGE OF SCHAUMBURG:

SECTION ONE: That a Special Use to convert an existing Type "A" automobile service station to a Type "C" automobile service station, in accordance with Article VII, Section 9.1 of the Zoning Ordinance; a variation to reduce the required front yard building setback along the south property line from twenty-eight (28) feet to twenty (20) feet, in accordance with Article VII, Section 9.5-1 and Article XII, Section 3.4-6 A. 1. of the Zoning Ordinance; and Site Plan Approval, be and they are hereby granted on property legally described as:

AMOCO SERVICE STATION – 10 E. GOLF ROAD
CASE NO. Z9010-12

THE WEST 163.0 FEET OF THE SOUTH 168.0 FEET OF THAT PART OF THE SOUTHEAST 1/4 OF SECTION 10, TOWNSHIP 41 NORTH, RANGE 10 EAST OF THE THIRD PRINCIPAL MERIDIAN, WHICH LIES NORTH OF THE NORTH LINE OF GOLF ROAD, AS DEDICATED UNDER DOCUMENT NO. 1048802 AND WHICH LIES EAST OF THE EAST LINE OF ROSELLE ROAD, AS RECORDED FOR TOWNSHIP DEDICATION DATED MAY 28, 1850 (EXCEPT THAT PART TAKEN FOR WIDENING OF ROSELLE ROAD BY INSTRUMENT RECORDED MARCH 16, 1968, DOCUMENT NO. 20430983) IN COOK COUNTY, ILLINOIS.

which property is located at the northeast corner of Roselle Road and Golf Road (10 E. Golf Road).

SECTION TWO: That said Special Use to convert an existing Type "A" automobile service station to a Type "C" automobile service station, front yard building setback variation, and Site Plan Approval, be and they are hereby granted subject to the following conditions:

1. Prior to the issuance of a building permit, the petitioner shall submit for review and approval from the Village of Schaumburg a Final Plat of Subdivision for the property. Upon said Plat, the petitioner shall also provide the dedication of twenty-eight (28) feet of additional right-of-way along Golf Road and ten (10) feet of additional right-of-way along Roselle Road, as well as a forty (40) foot triangular section of right-of-way immediately contiguous to the intersection.

2. An easement for public sidewalk to be located in the southwest corner of the property shall be recorded on the Final Plat of Subdivision for the property.

3. Prior to the issuance of a land development permit, the petitioner shall make a contribution of $4,245.00 to the Village of Schaumburg in lieu of installing a five (5) foot wide concrete sidewalk along Golf Road and an eight (8) foot wide asphalt bikepath along Roselle Road. This figure is based upon a total of 283 lineal feet at a cost of $15.00 per lineal foot.

4. Prior to the issuance of a land development permit, the petitioner shall make a contribution of $3,510.00 to the Village of Schaumburg in lieu of installing street lights along Golf Road. This figure is based on a total of 135 lineal feet at a cost of $26.00 per lineal foot.

5. Prior to the issuance of a land development permit, the petitioner shall make a contribution of $3,848.00 to the Village of Schaumburg in lieu of installing street lights along Roselle Road. This figure is based on a total of 148 lineal feet at a cost of $26.00 per lineal foot.

6. Prior to the issuance of a land development permit, the petitioner shall make a contribution of $10,125.00 (135 lineal feet x $75.00/l.f.) to the Village of Schaumburg for the extension of a twelve (12) inch watermain along Golf Road.

7. A Police and Fire Fund contribution of $0.10 per square foot of development, or a total of $103.10 (1,031 gross square feet x $0.10/sq. ft.), shall be paid prior to the issuance of a building permit.

8. A Medical Fund contribution of $250.00 per acre, or a total of $107.00 (.428 acres x $250.00), shall be paid prior to the issuance of a building permit.

9. Prior to the issuance of a building permit, the petitioner shall submit a Letter of Agreement to provide a future parking lot interconnect with the shopping center's parking lot located immediately contiguous to the west if and when said interconnect is feasible.

10. Prior to the issuance of a land development permit, the petitioner shall make a cash contribution of $2,094.00 to the Village of Schaumburg in lieu of installing parkway trees along Golf Road and Roselle Road. This figure is based upon a total lot frontage of 335 lineal feet and a unit cost of $6.25 per lineal foot, with parkway trees spaced at forty (40) foot intervals.

11. The petitioner is responsible for obtaining all necessary permits from the Illinois Department of Transportation (IDOT) prior to commencing any work within the right-of-way.

12. The petitioner is responsible for the provision and maintenance of seasonal flowers and planter plant materials.

13. All site signage requires a separate review and approval on the part of the Village.

14. All rooftop mechanical equipment shall be located beneath the canopy area and painted the same color as the principal structure.

15. At a minimum, the automobile service station shall offer public restroom facilities as well as water and air for motor vehicles for use by the general public.

16. Unless a building permit has been issued in accordance with the current regulations and require-

ments of the Village of Schaumburg, this Ordinance granting a Special Use shall be valid for a period of one (1) year from the date of its adoption by the Village Board of Trustees. A building permit, in accordance with the current regulations and requirements of the Village of Schaumburg, must be issued within one (1) year from the date of adoption of this Ordinance granting a Special Use, or the Special Use, without need for further action by any Village board, commission or official, shall become null and void. This Ordinance granting a Special Use shall expire, without need for further action by any Village board, commission or official, if the Special Use ceases to operate for a period of six (6) continuous months.

17. In the event the automobile service station is closed an inoperative for a period of six (6) consecutive calendar months, the owner of the subject property shall removal all structures, facilities, and underground storage tanks from the site and restore the surface. If the owner shall fail to do so within thirty (30) days from receipt of written notice from the Village, the Village shall have the right to enter upon the premises, remove all structures, facilities and underground storage tanks, restore the surface and file a lien against the property for its costs in connection with said removal and restoration.

18. The following plans shall be adopted as part of the governing ordinance:

    a. Site Plan, prepared by Amoco Oil Company, Engineering Department, Chicago Region, dated August 24, 1990, stamped October 24, 1990.

    b. Landscape Plan, prepared by Penco Associates, dated January 16, 1991, stamped January 17, 1991.

c. Preliminary Engineering Plan, prepared by Amoco Oil Company, Engineering Department, Chicago Division, dated September 25, 1990, revised November 28, 1990.

d. Reference Plan, prepared by Amoco Oil Company, Engineering Department, Chicago Division, dated January 8, 1990, revised October 1, 1990, stamped October 24, 1990.

e. Preliminary Elevations, prepared by Amoco Oil Company, Engineering Department, Chicago Division, stamped December 18, 1990.

f. Colored Rendering, stamped September 21, 1990.

g. Traffic Study, prepared by Metro Transportation Group, Inc., dated November 21, 1990.

SECTION THREE: The Director of Building and Code Enforcement and Director of Engineering of the Village of Schaumburg are hereby directed to issue the necessary permits upon proper application to effectuate the provisions of this ordinance.

SECTION FOUR: This ordinance shall be in full force and effect from and after its passage, approval, and publication in pamphlet form and posting in the manner provided by law. The Director of Planning, or his designee, is hereby directed to file a copy of this Ordinance with the Recorder of Deeds of Cook County, Illinois.

AYES: (5) TRUSTEES: DUNHAM, DAILLY, TROM, MORENZ

NAYS: (1) TRUSTEE DOMAN

ABSENT: (1) TRUSTEE TIKWART

ADOPTED this 9th day of July, 1991.

o/s Al Larson

Village President

ATTEST:

o/s Penny Dietrich

Village Clerk

ORDINANCE NO. 91-153 11/12/91

AMOCO SERVICE STATION - 10 E. GOLF ROAD
CASE NO. Z9109-07

AN ORDINANCE REPEALING ORDINANCE NO. 91-78, GRANTING SPECIAL USE FOR A TYPE "C" AUTOMOBILE SERVICE STATION, VARIATION AND SITE PLAN APPROVAL

WHEREAS, the Zoning Board of Appeals of the Village of Schaumburg conducted a public hearing on October 30, 1991 to consider a Village initiated request for the repeal of Ordinance No. 91-78 granting Special Use, variation, and Site Plan Approval for the Amoco service station, located at 10 E. Golf Road, Case No. Z9109-07; and

WHEREAS, The Zoning Board of Appeals has recommended the approval of said repeal of Ordinance No. 91-78; and

WHEREAS, the President and Board of Trustees of the Village of Schaumburg have determined that the repeal of Ordinance No. 91-78 is in the best interest of the Village of Schaumburg;

NOW, THEREFORE, BE IT ORDAINED BY THE PRESIDENT AND BOARD OF TRUSTEES OF THE VILLAGE OF SCHAUMBURG:

SECTION ONE: That Ordinance No. 91-78, granting Special Use for a type "C" automobile service station, front yard building setback variation, and Site Plan Approval, be and it is hereby repealed on property legally described as:

THE WEST 163.0 FEET OF THE SOUTH 168.0 FEET OF THAT PART OF THE SOUTHEAST 1/4 OF SECTION 10, TOWNSHIP 41 NORTH, RANGE 10 EAST OF THE THIRD PRINCIPAL MERIDIAN, WHICH LIES NORTH OF THE NORTH LINE OF GOLF ROAD, AS DEDICATED UNDER DOCUMENT NO. 1048802 AND WHICH LIES EAST OF THE EAST LINE OF ROSELLE ROAD, AS RECORDED FOR TOWNSHIP DEDICATION DATED MAY 28, 1850 (EXCEPT THAT PART TAKEN FOR THE WIDENING OF ROSELLE ROAD BY INSTRUMENT RECORDED MARCH 16, 1968, DOCUMENT NO. 20430983) IN COOK COUNTY, ILLINOIS.

which property is located at 10 E. Golf Road.

SECTION TWO: That all terms and conditions as listed in Ordinance No. 91-78, be and they are hereby repealed in their entirety.

SECTION THREE: This ordinance shall be in full force and effect from and after its passage, approval, and publication in pamphlet form and posting in the manner provided by law. The Director of Planning, or his designee, is hereby directed to file a copy of this Ordinance with the Recorder of Deeds of Cook County, Illinois.

AYES: (5) TRUSTEES: DAILLY, DUNHAM, TIKWART, TROM, PETERSON

NAYS: (0) NONE

ABSENT: (1) TRUSTEE MORENZ

ADOPTED this 12th day of November, 1991.

o/s Al Larson

Village President

ATTEST:

o/s Penny Dietrich

Village Clerk

Supreme Court, U.S.
FILED
OCT - 9 1996
OFFICE OF THE CLERK

No. 96-343

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

VILLAGE OF SCHAUMBURG,
a Municipal Corporation,

Petitioner,

v.

AMOCO OIL COMPANY,
a Maryland Corporation,

Respondent.

On Petition for Writ of Certiorari to the Illinois Appellate Court, First District

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN B. MURPHEY
Counsel of Record
ROBERT L. GAMRATH, III
ROSENTHAL, MURPHEY,
COBLENTZ & JANEGA
30 North LaSalle Street
Suite 1624
Chicago, Illinois 60602
(312) 541-1070

Attorneys for Respondent,
Amoco Oil Company

Midwest Law Printing Co., Chicago 60610, (312) 321-0220

TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
A. Course of Proceedings and Disposition of the Case Below	1
B. Correction of Misstatements in the Petition	2
REASONS FOR DENYING THE WRIT	3
I. THE APPELLATE COURT'S DECISION WAS A CORRECT APPLICATION OF THIS COURT'S REGULATORY TAKINGS DECISIONS	3
II. THE APPELLATE COURT'S DECISION IS CONSISTENT WITH *NOLLAN*, *DOLAN*, AND OTHER FIFTH AMENDMENT EXACTION CASES	4
III. THE APPELLATE COURT'S DECISION IS CONSISTENT WITH THE TAKINGS DECISIONS OF OTHER STATE AND FEDERAL COURTS OF APPEAL	14
CONCLUSION	16

TABLE OF AUTHORITIES

Cases: PAGE(S)

Amoco Oil Co. v. Village of Schaumburg, 277 Ill. App. 3d 926, 214 Ill. Dec. 526, 661 N.E.2d 380 (1995) 1, 5, 6, 12, 13

Andrus v. Allard, 444 U.S. 51, 100 S. Ct. 318, 62 L. Ed. 2d 210 (1979) 8, 10

Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602, 113 S. Ct. 2264, 124 L. Ed. 2d 539 (1993) 11

Dolan v. City of Tigard, 512 U.S. ____, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994) ..... *passim*

Estate and Heirs of Isabel Sanchez v. County of Bernalillo, 120 N.M. 395, 902 P.2d 550 (1995) . 14

Goffinet v. County of Christian, 65 Ill. 2d 40, 22 Ill. Dec. 79, 382 N.E.2d 399 (1976) 4, 5

Gordon v. Zoning Board of Appeals, 126 Misc. 2d 75, 481 N.Y.S.2d 275 (1984) 15

Goss v. City of Little Rock, ____ F.3d ____, 1996 WL 408530 (8th Cir. 1996) 12

Hernando County v. Budget Inns of Florida, Inc., 555 So. 2d 1319 (1990) 6

Horn v. City of Chicago, 403 Ill. 549, 87 N.E.2d 642 (1949) 5, 6

Keystone Bituminous Coal Assoc. v. DeBenedictis, 480 U.S. 470, 107 S. Ct. 1232, 94 L. Ed. 2d 472 (1987) 8, 9

LaSalle Nat'l Bank v. City of Chicago, 128 Ill. App. 3d 656, 83 Ill. Dec. 819, 470 N.E.2d 1239 (1984) 6

M & J Coal Company v. United States, 47 F.3d 1148 (Fed. Cir. 1995) 14

Manocherian v. Lenox Hill Hospital, 84 N.Y.2d 385, 618 N.Y.S.2d 857, 643 N.E.2d 479 (1994) . 12, 15

Nollan v. California Coastal Comm'n, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987) . ..... *passim*

Northern Illinois Homebuilders v. County of DuPage, 165 Ill. 2d 25, 208 Ill. Dec. 328, 649 N.E.2d 384 (1995) 12

Parking Lot Association of Georgia v. City of Atlanta, ____ U.S. ____, 115 S. Ct. 2268, 132 L. Ed. 2d 273 (1995) 12

Patzner v. Baise, 133 Ill. 2d 540, 142 Ill. Dec. 123, 552 N.E.2d 714 (1990) 6

Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978) 8, 9, 10

Quirk v. Town of New Boston, 140 N.H. 124, 663 A.2d 1328 (1995) 14

Rohn v. City of Visalia, 214 Cal. App. 3d 1463, 263 Cal. Rptr. 319 (1989) 6

St. Lucas Ass'n v. City of Chicago, 212 Ill. App. 3d 817, 156 Ill. Dec. 885, 571 N.E.2d 865 (1991) . 6

Schultz v. City of Grants Pass, 131 Or. App. 220, 884 P.2d 569 (1994) 6, 12

Sparks v. Douglas County, et al., 127 Wash. 2d 901, 904 P.2d 738 (1995) 6

Trimen Development Co. v. King County, 124 Wash. 2d 261, 877 P.2d 187 (1994) 12, 15

United States v. Alaska, 503 U.S. 569, 112 S. Ct. 1606, 118 L. Ed. 2d 222 (1992) 8

Van Duyne v. City of Crest Hill, 136 Ill. App. 3d 920, 91 Ill. Dec. 672, 483 N.E.2d 1307 (1985) . 6

Yee v. Escondido, 503 U.S. 519, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992) 8

Constitutional Provisions:

Fifth Amendment 4, 15

Rule Cited:

Supreme Court Rule 15.1 1

Article:

Robert H. Freilich and Elizabeth A. Garvin, *Takings After Lucas: Growth Management, Planning, and Regulatory Implementation Will Work Better Than Before*, 1993 Institute on Planning, Zoning and Eminent Domain §5.03 .. 5

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent requests that the Court deny the Petition for Writ of Certiorari, seeking review of an opinion by the Illinois Appellate Court, First District. The appellate court's opinion is reported at 277 Ill. App. 3d 926, 214 Ill. Dec. 526, 661 N.E.2d 380 (1995). The Illinois Supreme Court denied Petitioner's Petition for Leave to Appeal. *See* 167 Ill. 2d 549, 217 Ill. Dec. 662, 667 N.E.2d 1055 (1996).

STATEMENT OF THE CASE

Respondent respectfully opposes the Petition for Writ of Certiorari. None of the Rule 10 factors governing review on certiorari is present. The opinion of the appellate court is a straightforward application of this Court's decisions in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. ___ (1994). It is consistent with other federal and state courts considering similar issues. Finally, the decision sought to be reviewed is not final. The case is currently pending in the Circuit Court of Cook County, Illinois, for trial on damages.

A. Course of Proceedings and Disposition of the Case Below.

The opinion of the appellate court correctly sets forth both the facts of the case and its procedural history in a comprehensive and accurate manner. In accordance with Rule 15(2), Respondent respectfully invites this Court's attention to the appellate court's opinion.

B. Correction of Misstatements in the Petition.

The Petition contains two persistent factual and legal themes, both of which are false. First, Petitioner repeatedly contends that Respondent was not damaged after Petitioner repealed the ordinance containing the illegal dedication condition. In truth, when Petitioner repealed Respondent's permit, it stripped Respondent's ability to improve its property altogether as punishment for Respondent's refusal to capitulate to what *Nollan* recognized as an outright plan of extortion.

Second, Petitioner wrongly focuses only on that portion of Respondent's property which Petitioner was attempting to expropriate. For purposes of Respondent's takings claim, the property taken by Petitioner's action was not simply the two frontages, but its total denial of Respondent's ability to utilize its entire parcel for a lawful use, no different than had Petitioner erected a fence around the property. More to the point, the issue of takings damages has not been decided in this case and is a matter for disposition by the Illinois state courts.

REASONS FOR DENYING THE WRIT

I.

THE APPELLATE COURT'S DECISION WAS A CORRECT APPLICATION OF THIS COURT'S REGULATORY TAKINGS DECISIONS.

Petitioner makes the following arguments:

1. A municipality may require any transfer of private property without compensation as it deems fit as a condition of a special use permit, so long as there is no actual physical taking.

2. Where a municipality requires a dedication of a portion of an owner's property, and the owner still retains possession of the remainder of the property, the property owner has suffered no regulatory taking.

3. A municipality cannot be held accountable for an unconstitutional taking when those actions are "legislative."

4. The imposition by Petitioner of a condition to a special use permit requiring Respondent to donate over 20% of its property, without Petitioner having conducted any individualized analysis as to the impact of the improvements on the necessity for the required conveyance of property, still satisfies *Nollan*.

The appellate court correctly saw through these arguments and disposed of each of them. The appellate court's decision is consistent with the decisions of this Court and presents no new federal questions for consideration. The Petitioner's claim that this decision conflicts with other state and federal decisions is erroneous. This decision creates no conflict among the courts.

Section II of this brief addresses the Village's contention that the appellate court's takings decision conflicts with a prior decision of this Court, or presents an issue undecided by this Court. Section III of the brief addresses the contention that the opinion of the appellate court conflicts with other state and federal takings decisions.

II.

THE APPELLATE COURT'S DECISION IS CONSISTENT WITH *NOLLAN*, *DOLAN*, AND OTHER FIFTH AMENDMENT EXACTION CASES.

Petitioner argues the takings claim became moot because the unconstitutional condition was imposed by way of a special use permit that was invalidated when the condition was rejected, precluding any physical invasion of the property. (Petitioner's Brief at 11.) Petitioner relies on the Illinois Supreme Court's decision in *Goffinet v. County of Christian*, 65 Ill. 2d 40, 22 Ill. Dec. 79, 382 N.E.2d 399 (1976). *Goffinet* involved an amendment to a zoning ordinance, rezoning a property from agricultural to industrial, which conditioned the rezoning upon a particular use. *Goffinet* held that "conditional zoning is not invalid per se . . ." and that if an owner does not adhere to an otherwise valid condition, the result may be the revocation of the conditional zoning or special use permit. 65 Ill. 2d at 51, 53.

The Petitioner's argument in reliance upon *Goffinet* does not present a federal question. This Court's review of the argument is unnecessary. The *Goffinet* opinion is a state zoning decision and the Village's reliance upon it is misplaced. The appellate court correctly ruled on this Illinois zoning question. Moreover, to accept the Village's

logic would allow the Village to push the envelope of constitutionality, without recourse, by attaching illegal conditions to special use legislation with impunity.

The appellate court held that *Goffinet* was inapplicable. *Amoco Oil Co. v. Village of Schaumburg*, 277 Ill. App. 3d 926, 943-44, 214 Ill. Dec. 526, 537, 661 N.E.2d 380, 391 (1995). The appellate court recognized that the holding in *Goffinet* presupposed a validly enacted special use permit. *Id.* Petitioner's argument begs the question whether the special use permit was validly enacted. Consequently, the appellate court correctly found *Goffinet* not relevant.

Petitioner next argues that Respondent has no takings claim because there was no physical invasion of Respondent's property. (Petitioner's Brief at 9, 11.) Petitioner relies on the Illinois Supreme Court's decision in *Horn v. City of Chicago*, 403 Ill. 549, 87 N.E.2d 642 (1949). *Horn* does not apply to regulatory takings at issue in this case.

Horn involved physical taking, where the plaintiffs alleged a physical trespass onto their property. The case at bar involves a different type of taking, referred to as a title taking, "where the government acquires incidents of ownership or title to property or an exaction in lieu of the dedication of land." Robert H. Freilich and Elizabeth A. Garvin, *Takings After Lucas: Growth Management, Planning, and Regulatory Implementation Will Work Better Than Before*, 1993 Institute on Planning, Zoning and Eminent Domain §5.03. Title taking "differs from physical taking in that the regulating body does not physically invade the land but places a restriction on the use of the property that significantly interferes with ownership." *Id.* at §5.03[2][a].

As the appellate court duly noted, *Horn* is not controlling. *Amoco Oil Co.*, 661 N.E.2d at 389. The present case involves a regulation requiring Respondent to dedicate over 20% of its property as a condition to a special use permit. If Respondent were to capitulate, the Petitioner would have acquired fee title to Respondent's property. Such an exaction of property effectuates a title taking which courts have subjected to a takings analysis. *See Nollan*, 483 U.S. 825, *Dolan*, 512 U.S. ___, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994); *Sparks v. Douglas County, et al.*, 127 Wash. 2d 901, 904 P.2d 738 (1995); *Schultz v. City of Grants Pass*, 131 Or. App. 220, 884 P.2d 569 (1994); *Hernando County v. Budget Inns of Florida, Inc.*, 555 So. 2d 1319 (1990); and *Rohn v. City of Visalia*, 214 Cal. App. 3d 1463, 263 Cal. Rptr. 319 (1989).

Petitioner further contends that the opinions in *Patzner v. Baise*, 133 Ill. 2d 540, 142 Ill. Dec. 123, 552 N.E.2d 714 (1990), *LaSalle Nat'l Bank v. City of Chicago*, 128 Ill. App. 3d 656, 83 Ill. Dec. 819, 470 N.E.2d 1239 (1984), *St. Lucas Ass'n v. City of Chicago*, 212 Ill. App. 3d 817, 156 Ill. Dec. 885, 571 N.E.2d 865 (1991), and *Van Duyne v. City of Crest Hill*, 136 Ill. App. 3d 920, 91 Ill. Dec. 672, 483 N.E.2d 1307 (1985), control the outcome of this case. (Petitioner's Brief at 9.) The only common thread among these cases is that they all denied that a taking existed, but none of these cases is applicable to the present case. Certainly no issue for this Court's consideration is presented by this argument.

None of these cases involved a ***required*** dedication as a condition to the issuance of a land use permit. None of the property owners were required to give away ***their*** land, as Respondent was in this case. None of the Illinois cases had the benefit of this Court's guidance as set forth

in *Dolan*. Thus, the appellate court, in rendering its decision, was correct in refusing to apply the cases relied upon by the Village.

Nollan and *Dolan* illustrate that the government may effect a regulatory taking of private property, thus triggering the just compensation requirement, without an ***actual*** physical invasion. *Nollan* and *Dolan* recognize that governmental regulatory takings, involving the exaction of property as a condition to land use approval, do not fit neatly into the rubric of "inverse condemnation." As this Court stated in *Dolan*, "[w]ithout question, had the city simply required petitioner to dedicate a strip of land along Fanno Creek for public use, rather than conditioning the grant of her permit to redevelop her property on such dedication, a taking would have occurred." *Dolan*, 512 U.S. at ___, 114 S. Ct. at 2316. Similarly, as stated in *Nollan*, "Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on agreeing to do so, we have no doubt there would have been a taking." *Nollan*, 483 U.S. at 831, 107 S. Ct. at 3145.

The appellate court is in accord with the decisions of this Court by refusing to require a physical invasion of property for a regulatory taking to exist.

Alternatively, Petitioner argues that no taking occurred because the dedication condition did not dispossess Respondent of its entire parcel, just a mere 20%, leaving Respondent with an economically viable use of its property. (Petitioner's Brief at 13-14.)

Petitioner's reliance on the "economically viable use" analysis is misplaced when examining *Nollan/Dolan* takings. The economically viable use test is applied where a regulation restricts the use of property but does not go so far as to require an exaction. *See Yee v. Escondido*, 503 U.S. 519, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992); *Keystone Bituminous Coal Assoc. v. DeBenedictis*, 480 U.S. 470, 107 S. Ct. 1232, 94 L. Ed. 2d 472 (1987); *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978); *Andrus v. Allard*, 444 U.S. 51, 100 S. Ct. 318, 62 L. Ed. 2d 210 (1979). The economically viable use test, while appropriate for analysis of economic takings, does not apply to cases of outright or conditional land exactions. *See Keystone*, 480 U.S. at 496 ("The test to be applied . . . is fairly straightforward. A statute regulating the ***uses*** that can be made of property effects a taking if it 'denies an owner economically viable use of his land . . . .' " (emphasis added) (citations omitted)).

A closer review of the cases cited by the Village shows they are distinguishable in other ways. In *Yee v. Escondido*, this Court expressly recognized that a regulatory takings claim was not properly brought before the Court and refused to consider the issue. *Id.* at 532-3 ("[P]etitioners attempt to challenge the ordinance on two other grounds: They argue that it constitutes a . . . regulatory taking. [This] claim is not properly before us."). Petitioner also relies on *United States v. Alaska*, which is not even a takings case. This Court dealt with the specter of a taking in a footnote which discussed the applicability of *Nollan* to the case. *United States v. Alaska*, 503 U.S. 569, 590 n.12, 112 S. Ct. 1606, 1618, 118 L. Ed. 2d 222, ___ (1992) ("This rule [*Nollan*], however, has no applicability

in a situation such as this one, in which we evaluate the statutory authority underlying an agency's action.").

Keystone Bituminous Coal Assoc. v. DeBenedictis is also inapplicable because it strictly involved a facial challenge to legislation. *Keystone*, 480 U.S. at 493 ("Thus, *the only question before us is whether the mere enactment of the statutes and regulations constitutes a taking.*" (emphasis in original)). The posture of *Keystone* substantially differs from this case, where Petitioner refused to issue building permits and subsequently repealed Respondent's special use permit because Respondent refused to capitulate to an unconstitutional condition.

Penn Central is the prototypical economic regulatory takings case and its analysis does not apply to exaction takings. *Penn Central* stresses that a parcel must not be viewed as distinct segments, but as a whole. *Penn Central*, 430 U.S. at 130-31. This viewpoint is essential in economic regulatory takings cases because those types of takings deal with restrictions on a private property owner's ***use*** of the property. Every land use regulation, by definition, restricts some rights of a property owner's use. Were the property not viewed as a whole, every land use regulation would constitute a taking.

Exaction cases such as *Nollan, Dolan*, and this case, mirror the infringements found in physical takings cases where a property owner is required to relinquish real property title, not just submit to restriction of property rights. The relevant inquiry in these cases is whether the governmental body takes the property within the bounds of its authority, not whether the taking amounts to a significant enough infringement to even constitute a taking. *See Penn Central*, 438 U.S. at 124. ("A 'taking' may more

readily be found when the interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.") The vast differences in the types of takings in *Penn Central* and this case renders *Penn Central* inapposite.

Petitioner's reliance on *Andrus v. Allard* is misplaced. *Andrus* was specifically predicated on the fact that the property owner was not required to surrender the property. *Andrus*, 444 U.S. at 66 ("In this case, it is crucial that the appellees retain the rights to possess and transport their property, and to donate or devise the protected birds."). In this case Respondent was required to surrender its property. *Andrus* also held that the destruction of one "strand" in the bundle of rights does not amount to a taking "because the aggregate must be viewed in its entirety." *Id.* Viewing the Subject Property in the aggregate, Respondent was dispossessed of many "strands" in the bundle of property rights. Among other things, Respondent lost its ability to exclude others from its property; lost its right to receive just compensation for its property which Petitioner attempted to take for public use[1]; and, lost its right to devote its entire parcel for a lawful use until it paid its "land tax." While Respondent may retain some value in its property, that value is held in abeyance by the Petitioner until and unless Respondent succumbs to the unconstitutional condition. This Court has expressly stated:

---

[1] The State has recognized Amoco's right to receive just compensation for the taking of its property for public use by filing a condemnation action.

> [T]he government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for public use—in exchange for a discretionary benefit conferred by the government where the property sought has little or no relationship to the benefit.

Dolan, 114 S. Ct. at 2317.

Finally, *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 113 S. Ct. 2264, 124 L. Ed. 2d 539 (1993), does not support the Petitioner's position. *Concrete Pipe* is an economic regulatory takings case, which did not involve surrender of any property. This Court set forth the appropriate framework for analysis of takings such as the one in this case in *Nollan* and *Dolan*. The appellate court followed those decisions.

The appellate court correctly applied the decisions of this Court by following the analysis set forth in *Nollan* and *Dolan* for determining the constitutionality of a condition attached to zoning legislation, and by distinguishing the line of cases that deal with economic regulatory takings. Petitioner's misapplication of the "economically viable use" test in requesting review by this Court should be rejected. Accordingly, the Petition for Writ of Certiorari should be denied.

Petitioner also argues that *Nollan* and *Dolan* do not apply because both cases involve "adjudicative" rather than "legislative" actions. (Petitioner's Brief at 9.) The appellate court rejected this argument, stating, "Schaumburg thus apparently believes that it may skirt its obligation to pay compensation when taking private property for public use merely by having the Village Board of

trustees [sic] pass an 'ordinance' rather than by having a planning commission issue a permit. . . . Certainly a municipality should not be able to insulate itself from a takings challenge merely by utilizing a different bureaucratic vehicle when expropriating it citizen's property." *Amoco Oil Co.*, 277 Ill. App. 3d at 940, 942, 214 Ill. Dec. at 535, 536, 661 N.E.2d at 389, 390.

In *Parking Lot Association of Georgia v. City of Atlanta*, ___ U.S. ___, 115 S. Ct. 2268, 132 L. Ed. 2d 273 (1995), Justice Thomas, joined by Justice O'Connor, addressed the legislative distinction argument in a dissenting opinion. Justice Thomas wrote, "A city council can take property just as well as a planning commission can. . . . The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference." *Id.* at 115 S. Ct. 2268-69. The Illinois Supreme Court has also held that a "legislative" exaction requirement may effect a taking. *Northern Illinois Homebuilders v. County of DuPage*, 165 Ill. 2d 25, 208 Ill. Dec. 328, 649 N.E.2d 384 (1995). Also, cases in other jurisdictions further support the application of *Nollan* and *Dolan* to permit conditions cloaked in "legislative" garb. *Trimen Development Co. v. King County*, 124 Wash. 2d 261, 877 P.2d 187 (1994); *Manocherian v. Lenox Hill Hospital*, 84 N.Y.2d 385, 618 N.Y.S.2d 857, 643 N.E.2d 479 (1994); and *Schultz v. City of Grants Pass*, 131 Or. App. 220, 884 P.2d 569 (1994); *Goss v. City of Little Rock*, ___ F.3d ___, 1996 WL 408530 (8th Cir. 1996).

Contrary to the Village's argument, case law demonstrates that a "legislative act" is not insulated from judicial review. This narrow issue does not require this Court to exercise its discretionary review.

Petitioner next argues that should *Nollan* and *Dolan* apply, the dedication condition satisfied their test requirements, (Petitioner's Brief at 12), that there be a nexus between the proposed use of the property and the condition which the government seeks to impose, and that the condition be roughly proportional to the proposed use. *Dolan*, 512 U.S. at ___, 114 S. Ct. at 2317-19.

The appellate court rejected this argument as "belied by the record in this case." *Amoco Oil Co.*, 277 Ill. App. 3d at 938, 214 Ill. Dec. at 534, 661 N.E.2d at 388. The appellate court further stated that "the record is replete with evidence showing that the required dedication had little or no relationship to the anticipated impact of the proposed development." *Id.* at 939, 214 Ill. Dec. at 534, 661 N.E.2d at 388. Specifically, the court found that "Schaumburg's exaction of over twenty percent (20%) of Amoco's property on the basis of a de minimis increase in street traffic—four-tenths of one percent (0.4%)—does not correspond with the slightest notions of rough proportionality." *Id.* at 943, 214 Ill. Dec. at 537, 661 N.E.2d at 391. In sum, the court held that the Village's attempted exaction of Amoco's property constitutes a taking. *Id.* at 944.

The appellate court, after full review of the record, correctly applied *Nollan* and *Dolan* to the facts of this case. There is no reason for this Court to review the case, which is factually similar to, and even more egregious than *Dolan*.

III.

THE APPELLATE COURT'S DECISION IS CONSISTENT WITH THE TAKINGS DECISIONS OF OTHER STATE AND FEDERAL COURTS OF APPEAL.

Petitioner also seeks this Court's review by asserting that the decision of the appellate court in this case conflicts with decisions rendered by other state and federal courts of appeals. (Petitioner's Brief at 17-19.) The cases cited by Petitioner as conflicting with this case are inapposite.

Quirk v. Town of New Boston, 140 N.H. 124, 663 A.2d 1328 (1995), merely involved maintenance of a buffer zone (i.e., a set back) on private property, but there was no required dedication of any property. Moreover, the decision on the takings argument was specifically limited to review under the state constitution. *Quirk*, 663 A.2d at 1331.

Estate and Heirs of Isabel Sanchez v. County of Bernalillo, 120 N.M. 395, 902 P.2d 550 (1995), involved the denial of a special use permit, but again there was no exaction of property at issue. Also, the court in *Sanchez* did not consider any federal takings cases in reaching its conclusion that a taking did not exist.

Again, in *M & J Coal Company v. United States*, 47 F.3d 1148 (Fed. Cir. 1995), the property owner was not required to dedicate any property. The property owner also did not have any property rights in the land it claimed was taken. As a result, the court was not even confronted with whether the regulation of the property amounted to a taking. *M & J Coal*, 47 F.3d at 1154.

However, cases from other jurisdictions support the conclusion reached by the appellate court that municipal-

ities may no longer impose regulatory conditions without the requisite fit between the condition and the proposed development. *See Trimen Development Co. v. King County*, 124 Wash. 2d 261, 877 P.2d 187 (1994); *Manocherian v. Lenox Hill Hospital*, 84 N.Y.2d 385, 618 N.Y. S.2d 857, 643 N.E.2d 479 (1994); and *Gordon v. Zoning Board of Appeals*, 126 Misc. 2d 75, 481 N.Y.S.2d 275 (1984).

In *Gordon*, a property owner applied for a variance to extend her side yard to construct additional bedrooms. The municipal zoning board granted the variation conditioned upon the owner filing a covenant "irrevocably offering for gratuitous dedication to the County of Rockland, a strip of her front yard sufficient to allow the County at some later date to widen the road so that it conforms to the official map." *Id.* at 481 N.Y.S.2d 277. The Court succinctly identified the nature of the municipal action:

> What the Board has done here, however, is require the petitioner to pay for her variance by prospectively ceding her land to the County. This the Board cannot do. No one disputes that the petitioner has made the requisite showing entitling her to an area variance [citation]. The Board cannot, however, impose an unconstitutional condition upon the granting of such a variance. The Board's action constitutes a taking of private property for public use without just compensation in violation of the Fifth Amendment to the United States Constitution and Article I, Section 7 of the New York State Constitution.

Id. Gordon mirrors what happened to Amoco and, likewise, such action by the Petitioner constitutes an unconstitutional taking of private property.

The appellate court's decision in this case is consistent with the takings decisions in other state and federal appellate jurisdictions. As a result, the Petition for Writ of Certiorari should be denied.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JOHN B. MURPHEY
Counsel of Record
ROBERT L. GAMRATH, III
ROSENTHAL, MURPHEY,
COBLENTZ & JANEGA
30 North LaSalle Street
Suite 1624
Chicago, Illinois 60602
(312) 541-1070

Attorneys for Respondent,
Amoco Oil Company

October 9, 1996